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CONSTITUTIONAL RIGHTS OF PRISONERS*

By Major Conrad W. Forys**

Events at San Quentin and Attica have made prisoner demands front page news around the world. Less violent confrontations have helped to define the constitutional rights retained by incarcerated civilians and soldiers. The author examines this burgeoning area of the law, focusing on such matters as the free exercise of religion, censorship, and disciplinary proceedings. He concludes that some revision in military regulations is desirable to reflect recent judicial decisions.

I. INTRODUCTION

A. *THE PRISON SYSTEM*

In discussing the rights of military prisoners, an understanding of the past and present institutional framework is helpful. The current confinement practices with which we will be concerned have evolved not alone from a separate military confinement system, but also from the federal, state and local systems.

Until 1875, serious military offenders were confined in the state operated prisons, and minor offenders were handled within the Army at post guardhouses or central facilities such as Governors Island.[1] In 1873, the first United States Military Prison was established by Congress at Rock Island, Illinois, and relocated in 1874 at Fort Leavenworth, Kansas.[2] Branch prisons were estab-

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[1] *The Army Correctional System*, Office of The Adjutant General, Department of the Army (1952) (information booklet).

[2] *Id.* The reasons for establishing the system were reported by the Military Committee of the House of Representatives in recommending passage of its bill in 1871: "As a measure of economy it will be beneficial. These even have been guilty of some little crime, some violation of orders of superior officers, offenses not stained with any great amount of moral turpitude, not in the nature of a felony. But they are cast into prison, and stay there very frequently years and years by the side of men of the blackest character, who have committed robbery and murder, or other felonies. Now, it is very improper that these soldiers should be put there, and we feel that as a matter of economy—as a matter of humanity—as a matter of reformation,

lished at Fort Jay and Alcatraz in 1907, and for a short time (1913 to 1915) the entire system was operated by The Judge Advocate General. In 1915, the system was renamed the United States Army Disciplinary Barracks with control of the disciplinary barracks and staff supervision of post guardhouses and stockades vested in The Adjutant General. In the same year a system of parole for all military prisoners in the United States Army Disciplinary Barracks and its branches was authorized. In 1946, control of the United States Disciplinary Barracks and its various branches (now inactive) and staff supervision of post guardhouses and stockades passed to The Provost Marshal General.

In parallel to the military system, federal civilian prisoners were confined in state institutions until 1895. Then the United States Military Prison was temporarily used by the Department of Justice until the completion of the United States Penitentiary at Leavenworth, Kansas, in 1906, marked the start of the present federal system. Female federal prisoners continued to be boarded in state institutions until a separate facility was opened at Alderson, West Virginia, in 1927.[3] The military and federal prison systems, pursuant to agreement between the Secretary of the Army and the Attorney General, Article 58 of the Uniform Code of Military Justice, and 18 U.S.C. § 4083 have long provided for the confinement of military prisoners in federal civilian facilities.[4]

B. COURT REVIEW OF PRISONERS' COMPLAINTS

For many years the courts have been extremely reluctant to review the internal administration of any prison system, a re-

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they should have a place of their own, subject to the inspection of the higher officers of the Army, where the discipline of military men can be in a measure enforced and a uniformity of treatment tempered with humanity may be observed and enforced." H. SCHENDLER, HISTORY OF THE UNITED STATES MILITARY PRISON (1911).

[3] *Thirty Years of Prison Progress*, United States Penitentiary, Atlanta, Georgia.

[4] The number of military prisoners in federal institutions has varied from 155 in 1915 to 3,631 in 1947. *The Army Correctional System*, *supra*, note 1. Pursuant to 18 U.S.C. § 4083 (1964) persons convicted of offenses against the United States or by courts-martial punishable by imprisonment for more than one year may be confined in any United States penitentiary. But a sentence for an offense punishable by imprisonment for one year or less shall not be served in a penitentiary without the prisoner's consent. For the purposes of this section, whether a military prisoner can be confined in a United States penitentiary is resolved by looking to the length of sentence he could have received, rather than that which he actually received. Dorssart *v.* Blackwell, 277 F. Supp. 399 (N.D. Ga. 1967).

luctance which undoubtedly stemmed from their recognition of the many problems faced by prison administrators and the courts' own lack of expertise in the area. In view of these factors, a denial of jurisdiction over the subject matter by a court is understandable when it involves a dismissal of prisoners' petitions alleging no more than those deprivations inevitably accompanying incarceration in highly regulated institutions with limited resources, such as complaints of restrictions on movement, poor lighting or plumbing. However, the courts have not so limited their dismissal of prisoners' suits, but have also denied jurisdiction where mistreatment, needless restrictions, and arbitrary and and capricious action by prison officials have been alleged. Such a broad denial of jurisdiction, often referred to as "the hands-off doctrine," [5] in effect allowed prison officials to function without judicial review of their actions, and resulted in prisoners having few if any enforceable rights.

Recently, as in so many other areas of the law, the courts no longer seem willing to accept their lack of expertise and the problems facing administrators as impenetrable obstacles precluding the scrutiny of administrative action within prison walls. The assumptions of "the hands-off doctrine," that courts have no jurisdiction to entertain prisoner grievances, and therefore prisoners have no enforceable rights, are now of doubtful validity. The courts now generally assume they are competent to review prisoners' grievances and fashion appropriate remedies. As a consequence, they are now considering the previously neglected issue of what rights prisoners retain. In considering what rights prisoners retain, the early statement that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law" [6] is fast becoming the prevailing judicial philosophy. The implications of this new attitude are far reaching. As soon as a court adopts this attitude it is obviously either compelled to search the record for some justification for a withdrawal of the particular right by prison officials, or take the unlikely step of permitting the right to be withdrawn arbitrarily. Thus, it follows that absent institutional necessity, the restriction or deprivation of prisoners' rights will be condemned as arbitrary action that cannot, and indeed should not, survive. Even when the premise that a prisoner retains all those rights except those withdrawn by necessity is obliquely

[5] *See generally*, Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) for a complete discussion of the doctrine.

[6] Coffin *v.* Reichard, 143 F.2d 443 (6th Cir 1944) at 445.

phrased as, a prisoner has only such rights as can be exercised without impairing the requirements of prison discipline or security,[7] judicial attention has been focused on the basis for denial of the right.

The new theoretical basis of the courts is exemplified by the following:

> Acceptance of the fact that incarceration, because of inherent administrative problems, may necessitate the withdrawal of many rights and privileges does not preclude recognition by the courts of a duty to protect the prisoner from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by the court. "It is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clause of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under the color of state law" [citing *Washington* v. *Lee*, 263 Fed. Supp. 327,333 affirmed per curiam 390 U.S. 333].[8]

The quoted opinion is noteworthy not only for its articulation of the new judicial attitude, but for the proposition that the Due Process and Equal Protection Clauses are among the rights which prisoners retain. The question of what other rights are retained by prisoners will be discussed at length in this article which will examine prisoner rights in the following areas: racial segregation, communications, exercise of religion, medical treatment, punitive proceedings and early release, and prisoner and military status. In this examination, the reader should be alert to the actual or potential justifications for regulation of prisoners and withdrawal of their rights. If, as has been asserted, justification is mandatory, then unnecessary regulations or limitations are arbitrary action that should not be continued.

II. RACIAL SEGREGATION

Considering how thoroughly the United States Supreme Court has searched for the requisite state action in order to invalidate racial segregation under the Fourteenth Amendment,[9] it would

[7] Sostre *v.* McGinnis, 334 F.2d 906, (2nd Cir 1964), *cert. den*, 379 U.S. 892 (1964). *See also*, United States *v.* Maglito, 20 U.S.C.M.A. 496, 43 C.M.R. 296 (1971).

[8] Jackson *v.* Godwin, 400 F.2d 529, 532 (5th Cir. 1968).

[9] Marsh *v.* Alabama, 326 U.S. 501 (1946), the "company town" is state action; Shelley *v.* Kramer, 334 U.S. 1 (1948) judicial enforcement of restrictive covenants is state action; Terry *v.* Adams, 345 U.S. 461 (1953), the Jaybird "primary" as state action; Gamer *v.* Louisiana, 368 U.S. 157 (1961), licensing is state action; *see also* Burton *v.* Wilmington Parking Authority, 364 U.S. 810 (1961); Reitman *v.* Mulkey, 387 U.S. 369 (1967).

seem that any racial segregation in a confinement system could not be justified. However, under certain circumstances racial segregation in a prison is legally permissible. In *Lee* v. *Washington*,[10] the Supreme Court affirmed the decree of a three judge district court [11] directing desegregation of Alabama's prisons and invalidating the state statute which had required complete and permanent segregation of the penal system. The Court noted that the decree would make allowance for the necessities of prison security and discipline.[12] A concurring opinion elaborated on this: [13]

> In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court's opinion. That is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. We are unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination.

Subsequent to this case, two federal district courts have held that temporary racial segregation is permitted when compelled by necessity.[14] One court [15] concluded:

> it is evident that segregation, for the limited purpose of avoiding imminent prison violence, is at the discretion of prison authorities.

Although a group of militant prisoners may want continuing segregation within an institution for their own reasons, one district court has recently stated that black prisoners have no constitutional right to establish their own distinct society within a prison.[16]

Although racial segregation, under the *Lee* v. *Washington* exception, is not explicitly authorized in Army regulations as an emergency measure available for confinement facilities, it should be included, considering that it has in fact been used in

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[10] 390 U.S. 333 (1968).
[11] Washintgon *v.* Lee, 263 F. Supp. 327 (M.D. Ala. 1967).
[12] Lee *v.* Washington, 390 U.S. 333, 334 (1968).
[13] *Id.* at 334.
[14] Wilson *v.* Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968); Rentfrow *v.* Carter, 296 F. Supp. 301 (N.D. Ga. 1968). *But see* McClelland *v.* Sigler, 327 F. Supp. 829 (D. Neb. 1971), holding that segregation by race in state prison is constitutionally impermissible notwithstanding testimony that disturbances would accompany desegregation.
[15] Rentfrow *v.* Carter, 296 F. Supp. 301, 303 (N.D. Ga. 1968).
[16] Roy *v.* Brierley, 316 F. Supp. 1057 (W.D. Pa. 1970).

the last resort by corrections officers and is legally permissible. However distasteful and sensitive a measure it may be, it is certainly preferable to injury or loss of life whenever a race riot is imminent within a stockade.

The *Lee* v. *Washington* decision may have implications beyond the field of racial segregation. If the "institutional need" of maintaining security, discipline and good order is so essential to effective prison administration that the Supreme Court will permit prison authorities acting in good faith to modify desegregation when warranted by the circumstances, then perhaps other limitations on constitutional rights can also be justified in prisons using the same analysis. Conversely, if the "nexus" between a regulation or action by officials that limits constitutional rights and institutional needs (security, discipline and good order) cannot be sufficiently shown under the particular factual circumstances, then the limitations on the particular rights involved cannot be continued. If no showing of justification under the facts can be made, then the regulation or action by prison officials could be challenged as arbitrary and capricious. This analysis provides a convenient tool for gauging the merits of any Army regulation that has an effect upon the constitutional rights of prisoners, and determining whether any modifications are called for. It can also be used to determine the reasonableness of a corrections officer's actions in managing a confinement facility, with the prerequisite of good faith of particular importance. However, the elements of security, discipline and good order that comprise this concept of "institutional need" should not be regarded as all inclusive. Perhaps other elements, such as rehabilitation, should be added to complete the analysis.

III. COMMUNICATIONS

The control of prisoner communications is typically covered in detailed prison regulations which limit incoming and outgoing mail, the amount of printed matter which can be retained in a prisoner's possession, the number and types of visitors, communications with news media, and verbal expressions of prisoners.[17]

[17] *See generally*, Comment, *Constitutional Law—Enforcement of Prison Discipline and its Effect upon the Constitutional Rights of Those Imprisoned*, 8 VILL. L. REV. 379 (1963); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 983 (1962); Note, *The Problems of Modern Penology: Prison Life and Prisoner Rights*, 53 IOWA L. REV. 671 (1967); *see also Prisoner Correspondence: An Appraisal of the Judicial Refusal to Abolish Banishment As A Form of Punishment*, 62 J. CRIM. L.C. & P.S. 40 (1971).

In reviewing the earlier case law in the area, one commentator concluded that there is no absolute prisoner right to use the mails.[18] Until quite recently the courts generally by-passed any constitutional issues raised by prison control of prisoner communications.[19] In 1965, the Eighth Circuit [20] asserted that prison administration of correspondence would be subjected to judicial scrutiny whenever it was administered in such a fashion as to "shock general conscience or to be intolerable in fundamental fairness." [21] By this time the courts had generally upheld the censorship of both incoming [22] and outgoing mail.[23] Such censorship was permitted either as rationally related to the ends of discipline, institutional security, and rehabilitation, or as simply a matter of prison regulation not within the court's jurisdiction. The following passage is a typical judicial response:

> While an inmate of such an institution should be allowed a reasonable and proper correspondence with members of his immediate family, and, at times, with others, it is subject to censorship to be certain of its reasonableness and propriety. A broader correspondence is subject to substantial limitations or to absolute prohibitions. Control of the mail to and from inmates is an essential adjunct of prison administration and the maintenance of order within the prison.[24]

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[18] *Constitutional Rights*, *supra*, note 17 at 996.

[19] Comment, *supra*, note 17 at 385 and cases cited therein.

[20] Lee *v.* Tahash, 352 F.2d 970 (8th Cir. 1965).

[21] *Id.* at 972. The court speculated as to what factual circumstances would meet this standard and concluded that restricting correspondence where a serious family illness emotionally affected a prisoner would suffice. So, too, would the refusal to allow mailing of some particular letter which affects an absolute right by discriminating against a prisoner's race or religion.

[22] *E.g.*, Fulwood *v.* Clemmer, 206 F. Supp. 370 (DDC 1962); Dayton *v.* Hunter, 176 F.2d 108 (10th Cir. 1949), *cert. den.*, 338 U.S. 888 (1949); Numer *v.* Miller, 165 F.2d 986 (9th Cir. 1948); Fussa *v.* Taylor, 168 F. Supp. 302 (M.D. Pa. 1958). In United States *v.* Myers, 237 F. Supp. 852 (C.D. Pa. 1965), the denial to a state prisoner of the privilege of receiving mail written in Hungarian from his only relative when the privilege was afforded English-speaking prisoners and an interpreter was available was held to be unconstitutional discrimination under Korematsu *v.* United States, 323 U.S. 214 (1949), for which relief was available under the civil rights statute.

[23] *E.g.*, Gerrish *v.* State of Maine, 89 F. Supp. 244 (D. Maine 1950); Reilly *v.* Hiatt, 63 F. Supp. 477 (M.D. Pa. 1945); State *ex rel.* Jacobs *v.* Warden of Maryland Penitentiary, 190 Md. 755, 59 A.2d 753 (1948); Ortega *v.* Ragan, 216 F.2d 561 (7th Cir. 1954); Fulwood *v.* Clemmer, 206 F. Supp. 370 (DDC 1962).

[24] McCloskey *v.* State of Maryland, 337 F.2d 72, 74 (4th Cir. 1964). The specific holding of the case was that an anti-Semitic prisoner attempting to enter into correspondence to express anti-Semitic beliefs has no judicially enforceable right to propagandize, whether his propaganda be directed to other inmates or outsiders.

As this passage indicates, prison officials have also assumed a moralistic role by screening correspondence to insure "reasonableness and propriety." However, institutional regulation of such mail may not be exercised arbitrarily or in a discriminatory fashion as in *Rivers* v. *Royster*, where the prison superintendant's denial of the right of a Negro prisoner to receive a nonsubversive Negro newspaper while permitting white inmates to receive white newspapers was held to be a denial of equal protection under the Fourteenth Amendment.[25] Major exceptions to censorship by prison authorities have been made in the case of mail addressed to the courts or attorneys or government officials. The general feeling is that the right to counsel carries with it the right to use the mails to obtain and communicate with counsel,[26] and since the sole means of access to the courts available to prisoners is the mails, unlimited and uncensored use of the mails is required.[27]

But, some recent cases indicate that correspondence with attorneys is still not absolutely free from censorship. In *Cox* v. *Crouse*,[28] a warden's opening, reading, and communicating to the attorney general the contents of letters from a prisoner to his attorney was upheld by the Tenth Circuit. In *Rhinehart* v. *Rhay*[29] the intercepting of letters written to a prisoner's attorney

[25] 360 F.2d 592 (4th Cir. 1966). *Accord:* Jackson v. Godwin, 400 F.2d 529 (9th Cir. 1968) (arbitrary enforcement and application of prisoner newspaper and magazine regulations applied to publications aimed at the Negro reader is racial discrimination in violation of the 14th Amend.). *See also* Dayton v. McGranery, 201 F.2d 711, 712 (D.C. Cir. 1953) (dictum).

[26] Coleman v. Peyton, 340 F.2d 603 (4th Cir. 1965); McCloskey v. State of Maryland, 337 F.2d 72 (4th Cir. 1964). "That prison inmates do not have all the constitutional rights of citizens in society—and may hold some constitutional rights in diluted form—does not permit prison officials to frustrate vindication of those rights which are enjoyed by inmates, or to be the sole judge—by refusal to mail letters to counsel—to determine which letters assert constitutional rights." Nolan v. Scafati, 430 F.2d 548, 551 (1st Cir. 1970).

[27] A state and its officers may not abridge or impair a prisoner's right to apply to a federal court for a writ of habeas corpus. Johnson v. Avery, 393 U.S. 483 (1969). Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966), *cert. den.*, 385 U.S. 905 (1966) (censorship not permitted); prevention of timely appeal by suppression of appeal papers violates the Equal Protection clause of the 14th Amend. Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); mail censorship is a universally accepted practice so long as it does not interfere with the inmates access to the courts. Prewitt v. State of Arizona *ex rel.* Eyman, 315 F. Supp. 793 (D. Ariz. 1969); prisoners in isolation are not denied reasonable access to attorneys and the courts when their correspondence to these parties is restricted to cases already pending. Hatfield v. Bailleux, 290 F.2d 632 (9th Cir. 1962).

[28] 376 F.2d 824 (10th Cir. 1967), *cert. den.*, 389 U.S. 865 (1967).

[29] 314 F. Supp. 81 (W.D. Wash. 1970). *Accord*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

which contained reports of the prisoner's alleged observations of acts of oral sodomy among the prison population was held not a violation of the prisoner's civil rights. The latter case would suggest that the inclusion of extraneous matter (prison gossip, etc.) in correspondence with attorneys may serve as a pretext for official scrutiny of such mail, and may be enough to persuade a court to allow such censorship to continue. In permitting scrutiny of prisoner mail addressed to attorneys, a court in effect decides that interception of mail on behalf of other interested government officers, or suppression of allegations concerning prison conditions are more important than the preservation of the attorney-client communications privilege. Since prison officials do not know whether collateral matters are within correspondence unless they examine it, "reasonable limitations" [30] on privileged correspondence nullify the privilege.

One approach to reconciling the prison inspection of attorney correspondence with the need for unlimited use of the mails has been suggested by a federal court in Maine. The court noted that if mail is opened in the absence of the inmate, his attorney will be reluctant to communicate fully with his client because of the fear that the correspondence will be read by others. Therefore, Maine state prison officials are now permitted to continue opening such mail in a contraband inspection, but inmates are entitled to be present at the opening of their mail.[31]

In contrast to whatever censorship exception may exist in regards to courts, attorneys, and other public officers, absolute prohibitions against prisoner communications with the news media have been sustained.[32] This would seem to indicate that preventing the dissemination of prisoner allegations is a matter of high priority although there are no opinions sustaining the prohibition that discuss the underlying policy reasons.

Besides the censorship restrictions, regulations limiting the number and type of persons with whom a prisoner may correspond have been upheld [33] as well as limits on the amount of

[30] *E.g.*, Hatfield *v.* Bailleux, 290 F.2d 632 (9th Cir. 1962).

[31] Smith *v.* Robbins, 328 F. Supp. 162 (D. Maine 1971).

[32] *But see* McDonough *v.* Director, 429 F.2d 1189 (4th Cir. 1970), permitting prisoner correspondence with Playboy Magazine in order to obtain psychiatric, financial and legal assistance, but not if correspondence is to effect publication of a critique of penal laws or about the prisoner himself. *See also* Nolan *v.* Fitzpatrick, 326 F. Supp. 209 (D. Mass. 1971), which requires prison officials to justify a refusal to mail a letter to news media.

[33] *E.g.*, Lee *v.* Tahash, 352 F.2d 970 (8th Cir. 1965) (12 correspondents); Fussa *v.* Taylor, 168 F. Supp. 302 (M.D. Pa. 1958) (refusal of authorities to forward inmate's mail to his common-law wife incarcerated in state reformatory upheld).

printed matter that may be retained in a prisoner's possession.[34] Similarly, prison authorities have routinely limited the number and type of persons who may visit a prisoner. Considering that in *Walker* v. *Pate*,[35] a prisoner's complaint that he was not permitted to receive visits by his wife and daughter was held not to state a claim under the Sixth or Fourteenth Amendments, visitation rights can be severely limited [36] under the majority of court opinions. Although limitations of some sort are warranted by the time and space available to prisoners, narrower restrictions would seem to have little justification other than their traditional place in prison regulations, and may be viewed as a subtle punitive measure directed at prisoners generally. This feeling is buttressed by the observation that even greater restrictions on correspondence and visitation normally accompany prisoners placed in punitive isolation in many prison systems. In response to the argument that administrative limitations in censoring mail require limiting prisoners' correspondence, one commentator has answered that providing more censors should be considered as an alternative to limiting mail volume.[37] The same alternative should be applicable to visitation rights as well. Indeed, the possible consequences of eliminating all such restrictions should be explored, particularly the potential effect upon rehabilitation efforts. Most importantly, the justifications for all censorship and other limitations on communications should be examined in light of their adverse effects upon the First Amendment rights of not only the prisoners, but of the persons desirous of communicating with them. While such restrictions may be justified as rationally related to the ends of discipline, security, and perhaps rehabilitation, the rights of free speech that are involved demand vindication.

One federal district court has recently faced the constitutional issues alluded to above in a sweeping opinion [38] abolishing censorship of all outgoing mail and reducing censorship of incoming mail in the Rhode Island state prison system, concluding that

[34] *E.g.*, Carey *v.* Settle, 351 F.2d 483 (8th Cir. 1965) (5 books); United States *ex rel.* Lee *v.* Illinois, 343 F.2d 120 (7th Cir. 1956) (15 letter limit held justified because of potential fire hazard).

[35] 356 F.2d 502 (7th Cir. 1966), *cert. den.*, 384 U.S. 966 (1966).

[36] *E.g.*, United States *ex rel.* Raymond *v.* Rundle, 276 F. Supp. 637 (E.D. Pa. 1967): prison regulations circumscribing visitation rights of state prisoners under death sentence, a standard practice with regard to all similarly situated capital inmates, were reasonable in view of necessity of greater supervision.

[37] *Modern Penology*, *supra*, note 17, at 677.

[38] Palmigiano *v.* Travisono, 317 F. Supp. 776 (D. R.I. 1970).

total censorship serves no rational deterrent, rehabilitative, or security purpose. It should be noted that the temporary injunction issued by the court is only a prelude to the resolution of the issue as part of a suit now pending before a three judge court. The merits of the arguments are reflected by the court's rather drastic action as this early stage of the proceedings.

Based on both First and Fourth Amendment grounds, the *Palmigiano* opinion is unique in considering not only the free speech rights of prisoners, but those of person wishing to communicate with the inmates. The screening of incoming mail to protect prison security (drugs, weapons, escape implements) and eliminate inflammatory writings and hard core pornography is allowed under this ruling. But outgoing mail is not subject to scrutiny except pursuant to a search warrant, and then only if the mail is not directed to courts, attorneys, or public officials. Letters to these persons are considered to be protected under the First Amendment right to petition for grievances. The court commented upon the prison regulation requiring prisoners to authorize censorship of outgoing mail in return for mail privileges as an inherently coercive violation of prisoner's rights under the Fourth Amendment. This raises an interesting question as to the validity of any prison regulation prohibiting communications with the news media. While the court stated that prisoners have a right to receive printed matter, reasoning that freedom of the press includes freedom to circulate such material absent a compelling justification for interference by prison officials, it did not specify that prisoners may communicate directly with the media themselves. But since the court criticized the prison officials for using their censorship controls to suppress criticism of the institution and its officials, stating that censorship for this reason is an unconstitutional infringement of the first amendment rights of the prisoners, including the right to petition for grievances, the right of prisoners to communicate with news media would seem to exist by implication.[39] As a practical matter, considering that officials would be required to obtain a search warrant in the case of mail addressed to the media under the court's ruling, an

[39] Another federal district court has recently held the belief of prison authorities that a publication contains inaccuracies about maladministration of the New York prison system is not a legally sufficient ground for curtailing a convict's First Amendment rights. "Only a compelling state interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights." Fortune Society *v.* McGinnis, 319 F. Supp. 901, 904 (S.D.N.Y. 1970).

institutional policy of restricting such mail would be difficult to enforce, especially when such a policy could be circumvented by addressing media correspondence to relatives of other private persons who would then forward the mail pursuant to the prisoner's instructions.

Subsequent to *Palmigiano*, a federal district court expressly permitted prisoners to communicate directly with the news media under the rationale that it is better to let prisoners write newspapers than call public attention to prison conditions by rioting. In this case, *Noland* v. *Fitzpatrick*,[40] Judge Wyzanski held that state prisoners are entitled to write any news media an unsealed letter concerning prison conditions unless officials can justify their withholding of the correspondence on the grounds of security or rehabilitation efforts.

In pointing out that prison officials have no obligation to protect the community from prisoner communications, the *Palmigiano* court has in effect ruled that an institution's internal policies will be communicated to the public not only by the governmental agency concerned but by those persons subject to its authority, who obviously have an entirely different prespective. Both the prisoners' and officials' views of the efficacy of prison regulations, the competence of management, and the quality of prison life are subject to the distortions of self interest. But the fact that prisoners' versions are often incorrect should not detract from their potential value in assessing actual prison conditions when they can be corroborated. With the benefit of both versions of prison conditions in the public forum the community is better equipped to make informed judgments concerning the type of prisons it wants. Thus, the recognition of the constitutional rights of prisoners and others in communicating would have the socially desirable result of promoting prison reform to an acceptable community standard.

Another issue raised in the *Palmigiano* case is whether limiting the number of persons with whom a prisoner may correspond is related to the maintenance of prison security. Once the First Amendment rights of prisoners are recognized and the prison officials are deemed to have no duty to protect the community from prisoner communications, it would seem that only reasonable limitations imposed by time and space requirements within the prison can be legally justified. The court in *Palmigiano* noted this probable conclusion by remarking, "Why should there be any limitation on the number of correspondents except as it may

[40] 326 F. Supp. 209 (D. Mass. 1971).

be based on the amount of time available to the inmate for writing letters and the amount of physical space and facilities available?" [41] It would thus be difficult to sustain those prison regulations which prohibit correspondence to an unmarried woman on the basis of prison security or discipline.

By extending the *Palmigiano* and *Fortune Society* [42] holdings to visitation regulations, it would seem that any prison rules limiting visitation rights to persons who have a specified relationship with the prisoner would be an unconstitutional impairment of the first amendment rights of both the prisoners and those persons desiring to communicate verbally with them. More stringent restrictions based on the need for maintaining security and good order would be justified only where a prisoner has established himself as a threat to institutional order by a pattern of violent conduct within or outside the institution,[43] such as the recent controversy surrounding the Soledad Brothers in San Quentin, where the consequences of a breach in security controls on visitors have been dismally portrayed. However, even such prisoners as George Jackson can be effectively controlled by the use of hand and leg irons along with tranquilizers. In view of the recent San Quentin disaster, prison officials will be reluctant to permit access to prisoners in punitive segregation though it certainly is feasible so long as the visitors are willing to subject themselves to verbal abuse from the inmates, and the internal structure and security of the institution preclude the possibility of their physical abuse. Such a policy might have the additional benefits of insuring that maximum security areas would be properly maintained and aiding rehabilitation. Any person willing to enter this area would have an interest in the welfare of the prisoner at least as strong as that of the confinement personnel.

In *Seale* v. *Manson*,[44] the court used the concept of reasonableness in limiting contact of prisoners with the outside community to attorneys and relatives. The opinion is noteworthy in its approval of limitations on the number of press interviews of prisoners, stating that gaining notoriety and becoming a "wheel" in the prison is a proper concern of prison administration.

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[41] Palmigiano *v.* Travisano, 317 F. Supp. 776, 791 (D. R.I. 1970).

[42] Fortune Society *v.* McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

[43] *Compare* Davis *v.* Superior Court, 175 Cal. App.2d 8, 345 P.2d 513 (1959), *with* Walker *v.* Pate, 356 F.2d 502 (7th Cir. 1966), *cert. den.*, 384 U.S. 966 (1966), *and see* United States *ex rel.* Raymonds *v.* Rundle, 276 F. Supp. 637 (E.D. Pa. 1967) (greater restrictions on visitation rights of prisoners sentenced to death are reasonable in view of the need for closer supervision).

[44] 326 F. Supp. 1375 (D. Conn. 1971).

In contrast, verbal expressions by prisoners directed to fellow inmates can be restricted because of the threat such expressions may pose as incitements to violence. In such cases the normal presumption against prior restraint of potentially inflammatory speech is not relevant because prison officials must be empowered to suppress violence in the first stages out of sheer necessity.[45]

The Army regulations governing the communications of military prisoners generally provide for limitations on mail and visiting privileges only as dictated by security control, correctional requirements, and facilities available.[46] In this area, the

[45] A prisoner may be punished for uttering words which tend to incite a breach of prison discipline or a riot. Fulwood *v.* Clemmer, 206 F. Supp. 370 (DDC 1962). Attempts of prisoners to speak in a milieu where such speech may incite insurrection must be tempered; in a prison environment strong restraint of speech and heavy penalties for violation of these restraints are in order. Roberts *v.* Pepersack, 256 F. Supp. 415 (D. Md. 1966), *cert. den.*, 389 U.S. 877 (1966).

[46] Army Reg. No. 190–4, para 5–4 (12 Jun. 1969) [hereafter cited as AR 190–4].

"The maintenance of wholesome and frequent contacts with their families and others genuinely interested in their welfare is a vital factor in the correction of prisoners. The right of prisoners to mail and visiting privileges will be limited only by security control, and correctional requirements as provided herein, and the facilities available for proper inspection, handling, and supervision. Restrictions on mail or visiting privileges will not be imposed as a disciplinary measure.

a. Authorized correspondents and visitors.

No limitations will be imposed as to the number of persons who may be approved for the purpose of visiting or corresponding with a prisoner except as necessary to maintain security and control. The prisoner's wife, children, parents, brothers, and sisters should uniformly be approved unless disapproval is required in the interest of safe administration or the prisoner's welfare. Other persons may be approved as correspondents and visitors when this appears to be in the best interest of the prisoner.

b. Mail.

(1) Restrictions will not be placed on the number of letters to or from authorized correspondents, except as necessary for security and control, prevention of unreasonable individual excesses, or to prevent delays in processing mail. Prisoners will be authorized to retain reasonable quantities of mail in their immediate possession; they will not be required to destroy excess retained mail, but will be given the opportunity to authorize deposition [sic] by storage at the confinement facility or forwarding it at his expense to an authorized correspondent for retention.

(2) Prisoners' incoming mail, except privileged correspondence, will be inspected by the officer in charge of the confinement facility, or his designated assistant, solely for the purpose of properly controlling contraband, moneys, and valuables. The opening of prisoners' incoming mail will be witnessed by a designated bonded person. The written content of letters will not be used as the basis for rejection of incoming mail.

(3) Prisoners' outgoing mail will not be inspected, except in specific individual cases, as approved by the officer in charge of the confinement facility, where the inspection of the prisoner's outgoing mail, other than privileged correspondence, is considered necessary for the adequate security,

regulatory scheme represents a liberal approach by safeguarding the constitutional rights of military prisoners in most respects. However, some improvements in the regulation should be made. By not setting a definite limitation on the number of correspondents and visitors the regulation begins in the right direction. However, routine approval of such persons is limited to the prisoner's relatives. In the case of other persons, approval as correspondents and visitors may be effected "when this appears

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control, or correctional treatment of the prisoner concerned. In such specific cases, the prisoner's outgoing mail will be delivered to the officer in charge of the confinement facility before it is introduced into postal channels; the written content of prisoners' outgoing mail will not be used as the basis for its rejection. Any outgoing mail, however, which upon such inspection, is found to contain vulgar or obscene language, or which would constitute a violation of postal laws, will be rejected. In all other cases, prisoners' stamped outgoing mail will be deposited by the prisoner in mailboxes. . . .

(4) (*a*) When a prisoner has not authorized the inspection of outgoing mail in the specific individual cases provided for in (3) above, such mail will not be introduced into postal channels but will be returned to the prisoner with an explanation of the necessity for inspection of the mail in his particular case.

(*b*) When a prisoner has not authorized inspection of his incoming mail, such mail will be shown to him unopened and he will be afforded an opportunity to receive it subject to inspection. If he refuses inspection, he may elect to have such mail retained unopened in his personal effects or, if a return address is shown, to have it returned to the sender unopened with an explanation by the correctional officer as to why it was not delivered to the prisoner. The sender will be advised that any information of an emergency nature contained in returned mail may be furnished directly to the correctional officer for transmission to the prisoner. . . .

Id. (Change No. 3, 10 March 1971) (7) Privileged correspondence—

(*a*) All correspondence between a prisoner and the President, Vice President, Members of Congress, Attorney General, The Judge Advocates General or their representative, his defense counsel, or any military or civilian attorney of record. Initial correspondence with any other attorney listed in professional or other directories for the purpose of establishing an attorney-client relationship, and all correspondence between a prisoner and inspectors general, chaplains and/or his clergyman will be regarded as privileged correspondence not subject to inspection; except . . . solely to insure the authenticity of the correspondence.

(*b*) Correspondence addressed to or received from the appropriate appellate agency of The Judge Advocate General of the Department concerned will be delivered or forwarded without inspection except . . . when there is reason to doubt its authenticity.

c. Reading material. Prisoners will be permitted to subscribe to newspapers, periodicals, magazines, and books approved by the commander of the confinement facility; however, he must receive the publication directly from the publisher.

d. Telegraphic or telephone communication. Telegraphic communications may be authorized when warranted by existing circumstances. Telephone calls to or by prisoners, at the expense of the caller, may be permitted in emergencies or when the correctional officer or officer designated by the commander of a disciplinary barracks or correctional training facility deems

to be in the best interest of the prisoner." [47] This phraseology would seem to place a burden upon the prisoner and the prospective correspondent of showing the propriety of their relationship. Would a corrections officer be justified, with or without such a showing, in prohibiting correspondence between a prisoner and a number of unmarried women, or married women unrelated to the prisoner? Under the current regulations confinement personnel may make such moral judgments.

Outgoing mail cannot be inspected except in specific cases. But the regulations by providing for inspection when necessary for security, control or correctional treatment of a specific prisoner (except for privileged correspondence) can be viewed as permitting inspection in such broad circumstances as to allow the exception to swallow the rule. By permitting rejection of outgoing mail which, upon inspection, is found to contain "vulgar or obscene language," confinement personnel are thrust into the role of protecting the sensibilities of the public. This was criticized in *Palmigiano* as unjustified. A better approach would be the inclusion of the Supreme Court *Roth* obscenity test in the regulation as a guide to the exercise of official discretion in excising obscene passages prior to forwarding. Requiring inspection of outgoing prisoner mail in some specific cases can be viewed as inherently coercive. It collides directly with the *Palmigiano* requirement for a search warrant prior to opening mail, and *Fortune Society's* requirement for a showing of a substantial justification.[48] The specific needs for inspection of outgoing mail to particular classes of correspondents should be considered so that inspection can be eliminated whenever necessity does not exist to any compelling degree.

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it essential for the prisoners' welfare. These calls may be monitored if considered necessary.

e. Visits.

(1) *General.* General restrictions on the number and length of visits and on the number of authoriz.. persons permitted to visit at any one time will be limited to those which are necessary for the safe handling of visits, prisoner control, and those made necessary by operational routines or limited facilities. In determining the need for exceptions, consideration should be given to the distance traveled by visitors, the frequency of visits, and other pertinent factors. Reasonable exceptions as to the time and length of visits will be made for military and civilian counsel to interview their clients regarding pending legal affairs.

(2) *Supervision and control.*

(a) All visits to prisoners will be supervised.

(b) Communication between the prisoner and his military or civilian counsel will be respected as confidential. . . ."

[47] *Id.*

[48] Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

Surprisingly, the rather comprehensive listing of privileged correspondence in Army Regulation 190–4,[49] while including appellate agencies of The Judge Advocate General, does not specifically include federal courts. Considering the importance of allowing unfettered correspondence with the judiciary, as discussed earlier in this section, a specific inclusion of the judiciary within the non-inspection privilege would be called for at a minimum.

For all practical purposes, the Army regulations prohibiting communications by prisoners with the press[50] are constitutionally defective under the *Palmigiano* case by infringing on the First Amendment rights of the prisoners. The regulation also fails to consider the media's First Amendment right of freedom of the press by denying access to the prisoners. An examination of the underlying policy reasons for the prohibition is necessary to determine whether any compelling justification exists for such an infrigement, but it is doubtful if sufficient justification can be marshalled in support of a policy that results in the suppression of criticism of the Army confinement system. Such a suppression is done at the expense of not only the prisoner and the press, but also of the community which should not be denied the opportunity to receive information concerning the confinement systems from such sources so that an informed judgment concern-

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[49] Note 46, *supra*.

[50] AR 190–4, paras 2–4*b*, *c* (Change No. 3, 10 Mar. 1971).

"*Press interviews.* Press interviews with military prisoners are not authorized under any circumstances. For the purpose of this regulation, the term 'press interview' includes any medium whereby military prisoners release information or statements for general publication. It includes, but is not limited to, interviews between prisoners and reporters of the public press or other writers, either in person or by other means of communication . . . for release to the general public, and telephone, radio, or television interviews or appearances.

"*Release of material prepared by prisoners for publication.*

(1) Material written by prisoners will not be approved for publication, in other than local confinement facility media. Exceptions to this policy may be recommended by the commander concerned when the material, after screening, is deemed suitable for publication in outside media and meets the following requirements:

(*a*) It is not considered inimical to the interests of the U.S. Government.

(*b*) It is not concerned primarily with confinement facilities, confinement procedures, or routines, the prisoner's individual case, or the cases of other prisoners.

(2) Material believed appropriate to warrant an exception to policy will be forwarded by the commander of the confinement facility concerned, with his recommendations, through normal command channels to The Provost Marshal General . . . ."

ing the reasonableness of confinement administration can be made.

IV. EXERCISE OF RELIGION

In considering the religious rights of prisoners, the courts have applied the holdings of *Cantwell* v. *Connecticut* [51] and related cases [52] that freedom of religious belief is an absolute right under the First Amendment, but religious exercise is subject to regulation. Since the First Amendment thus denies to government officials the power to determine what is a religion or religious activity,[53] the courts have focused upon the issue of what restrictions a prison may justifiably place upon the exercise of religion by inmates. The cases reflect the courts' attempts to strike a realistic balance between religious exercise and the regulation of prisoner conduct, usually done in terms of reasonableness. It has been suggested that an approach preferable to the reasonableness test would be to limit prison restrictions to those which are essential to institutional security and discipline.[54] However, the most desirable means of evaluating prison regulation of religious exercise would be the rationale derived from *Lee* v. *Washington*. Since we are again dealing with a First Amendment right, only those regulations which can be related to the institutional need for security, discipline and good order should be retained as necessary.

Whatever test is used to gauge a particular restriction of religious exercise, the restriction itself should relate to prisoner status rather than the denomination of religious belief.[55] Punishments effected on the basis of religious belief would certainly be held invalid under *Cantwell*, and the courts have not hesitated to intervene where the practice of religion by all prisoners has been unreasonably curtailed. Conversely, pressuring prisoners to attend religious services by scheduling mandatory physical training or close order drill for those who elect not to attend would violate the Establishment Clause of the First Amendment no matter how closely related to rehabilitative efforts.

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[51] 310 U.S. 296 (1940).

[52] Reynolds *v.* United States, 98 U.S. 145 (1879); United States *v.* Ballard, 322 U.S. 78 (1944).

[53] *See* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 983 (1962), at 1502.

[54] Note, *The Problems of Modern Penology: Prison Life and Prisoners Rights*, 53 IOWA L. REV. 671 (1967), at 685.

[55] McBride *v.* McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957); Walker *v.* Blackwell, 411 F.2d 23 (5th Cir. 1949) (prisoner must demonstrate deprivation of a right by discrimination).

Much of the litigation in the last decade concerning prison restrictions on the exercise of religion has involved Black Muslim prisoners.[56] The cases have spawned a considerable amount of commentary.[57] The hostility of prison officials to this sect was somewhat understandable. The racist pronouncements of its leaders could only promote ill feelings between its members and other inmates, increasing the difficulty of maintaining good order. Muslim discipline imposed within the sect and not by prison authority was viewed with suspicion and as inimical to established controls. Various elements of religious practice by the sect, such as its dietary laws, can be difficult, if not impossible, to accommodate without incurring substantial expense and possibly inconveniencing other prisoners. Despite these problems, the courts, mindful of the *Cantwell* case, have forced prison officials to allow the Muslims and other such sects to practice their religion so long as their practice does not interfere with normal prison functioning to the detriment of other prisoners, is not extremely difficult to administer, or does not result in prison expense.

From these cases and comments it can be stated that prison officials cannot question the legitimacy of a religious sect.[58] They can when necessary tightly circumscribe prisoner activities related to religious practice other than periodic attendance at religious services,[59] and when prisoners have been placed in

[56] The leading cases in this area are: Brown *v.* McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962); *In re* Ferguson, 55 Cal.2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. den.*, 368 U.S. 864 (1961); Sewell *v.* Pegelow, 291 F.2d 196 (4th Cir. 1961); Pierce *v.* La Vallee, 293 F.2d 233 (2d Cir. 1961); Sostre *v.* McGinnis, 334 F.2d 906 (2d Cir. 1964), *cert. den.*, 379 U.S. 892 (1964).

[57] Note, *Suits by Black Muslim Prisoners to Enforce Religious Rights*, 20 RUTGERS L. REV. 528 (1966); Brown, *Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review*, 32 GEO. WASH. L. REV. 1124 (1964); Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488 (1962); Comment, *Constitutional Law—Right to Practice Black Muslim Tenets in State Prisons*, 75 HARV. L. REV. 837 (1962); Yaker, *The Black Muslims in the Correctional Institutions*, 13 THE WELFARE REPORTER 158 (1962).

[58] *See* footnotes 56 and 57 *supra*.

[59] Evans *v.* Ciccone, 377 F.2d 4 (8th Cir. 1967); Sharp *v.* Sigler, 408 F.2d 966 (8th Cir. 1969), "Preservation of order and protection of the rights of others are controlling factors" (Blackmun, Circuit Judge); Childs *v.* Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. den.*, 376 U.S. 932 (1963), ". . . Potential prison violence dictates that any breach of discipline presents a 'clear and present danger' justifying severe repression . . . upon clear demonstration of the imminent and grave disciplinary threat of the Black Muslims as a group in a particular prison, proscription of their activities seems constitutionally permissible . . . ." 62 COLUM. L. REV., *supra* note 57, at 1503, 1504.

solitary confinement almost all their religious [illegible] be eliminated.[60] But even when the prisoners are part of the regular prison population their particular religious practices must not preclude their conforming to prison regulations applicable to all, such as regulations prohibiting inflammatory literature,[61] requiring periodic haircuts and shaving,[62] and requiring prisoners eat the normal prison diet at specified hours,[63] so long as the regulations are themselves reasonable. The courts appear to be divided over the question of whether a chaplain of a given faith must be provided to prisoner members of that religious sect.[64] Practically, provision for a chaplain would seem to depend upon such factors as the number of prisoners within the prison population who desire such services, the availability of a suitable clergyman, and the total number of all religious services an institution can reasonably be expected to accommodate within its resources.

The Army has established a policy of encouraging individual religious practice in the confinement system. Religious services for prisoners in general must be provided,[65] but the actual con-

[60] Depriving those in temporary solitary confinement of prayer book not cruel and unusual punishment, Wright *v.* McMann, 257 F. Supp. 739 (N.D.N.Y. 1966); prohibiting an inmate from attending mass while in disciplinary segregation not cruel and unusual punishment and not an unreasonable restriction on exercise of religion where chaplain could visit prisoner, McBride *v.* McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957); providing chaplain to prisoners in solitary within discretion of authorities, Belk *v.* Mitchell, 294 Fed. Supp. 800 (W.D. N.C. 1968).

[61] Inflammatory materials may not be received, even though religious in nature, Desmond *v.* Blackwell, 235 F. Supp. 246 (M.D. Pa. 1964), and may be confiscated, *In re* Ferguson, 55 Cal.2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. den.*, 368 U.S. 864 (1961); but a religious publication may be received on a regular basis and only specific inflammatory issues may be withheld, Northern *v.* Nelson, 315 F. Supp. 687 (N.D. Cal. 1970); antipathy caused by anti-white statements in religious literature do not justify suppression since the probability of igniting a riot is too speculative, Long *v.* Parker, 390 F.2d 816 (3d Cir. 1968); there is no unlimited right to take correspondence course from a bible school, Diehl *v.* Wainwright, 419 F.2d 1309 (5th Cir. 1970).

[62] Not a violation of free exercise of religion, Brooks *v.* Wainwright, 428 F.2d 652 (5th Cir. 1970); Brown *v.* Wainwright, 419 F.2d 1377 (5th Cir. 1970) (mustache alleged by prisoner to be a gift of his creator).

[63] Walker *v.* Blackwell, 411 F.2d 23 (5th Cir. 1969); Childs *v.* Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. den.*, 376 U.S. 932 (1963).

[64] Prison authorities required to pay an available Muslim minister to perform services in accordance with institutional rules at a rate of pay comparable to that received by ministers of other faiths, Northern *v.* Nelson, 315 F. Supp. 687 (N.D. Cal. 1970); Walker *v.* Blackwell, 411 F.2d 23 (5th Cir. 1969); *contra:* Gittlemacker *v.* Prasse, 428 F.2d 1 (3d Cir. 1970) (no violation of Free Exercise clause in failing to supply inmate with clergyman of his choice because of the problem of the sheer number of religious sects).

[65] AR 190–4, para. 3–4*b* (Change No. 3, 10 Mar. 1971): "Religious services will be provided for prisoners, and they will be allowed to worship according to their faiths, subject to the circumstances and conditions pertaining to

trols which may be imposed upon religious practice are extremely vague, covered by the phrase, "subject to the circumstances and conditions of confinement." [66] This terminology gives commanders and corrections officers considerable discretion. For those prisoners in disciplinary segregation the regulations provide for daily visits by a chaplain [67] and retention of religious books,[68] but not for their attendance at regular religious services. Denying such prisoners the opportunity to attend regular services can be justified under the regulation because of the threat a prisoner may pose to the security and good order of the confinement facility, as demonstrated by his past violent conduct. It can also be viewed as cured by the chaplain's daily visits which in effect substitute one means of religious practice for another.[69] Overall, the regulatory provisions seem to be reasonable and can be factually related to security, discipline, and good order within a confinement facility.

V. MEDICAL TREATMENT

As a general proposition, a prisoner is entitled to reasonable medical care.[70] The rationale for this proposition is that a government has an absolute obligation to treat its convicts with decency and humanity,[71] which is another way of saying that denying a prisoner medical care or furnishing inadequate medical care is a

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their confinement. Commanders will endeavor to provide all prisoners the opportunity to receive the ministration that the denominations of which they are members require, as necessarily modified by the conditions and circumstances pertaining to confinement." Army Reg. No. 210–170, para 8(9) (Change No. 1, 10 Aug. 1964): "The chaplain will function under the direct supervision of the commandant, and will have direct access to all members of the disciplinary barracks staff and to prisoners."

[66] *Id.*

[67] AR 190–4, para 2–2*c*(3) (Change No. 3, 10 Mar. 1971): "Prisoners in disciplinary segregation will be visited once each day by a medical officer, a chaplain, and the prisoner's counselor."

[68] *Id.* at 2–2*c*(2): "Prisoners in disciplinary segregation will be provided . . . religious books appropriate to the prisoner's faith as requested by him and approved by the confinement facility chaplain, except when it is determined by the correctional officer that the temporary removal of such articles or equipment is necessary to prevent damage to property or injury to the prisoner or others . . . ."

[69] Considering the restrictions upon prisoners in this category that have been upheld by the courts, the present regulation is an acceptable approach.

[70] Blanks *v.* Cunningham, 409 F.2d 220 (4th Cir. 1969); Grear *v.* Maxwell, 355 F.2d 991 (6th Cir. 1966); Coleman *v.* Johnston, 247 F.2d 273 (7th Cir. 1957); *see also* Smedman, *Prisoners and Medical Treatment*, 4 CRIM. L. BULL. 450 (1968).

[71] Johnson *v.* Dye, 175 F.2d 250 (3d Cir. 1949) at 256, *rev'd on other grounds*, 338 U.S. 864, *rehearing denied*, 338 U.S. 896 (1949).

violation of the Eighth Amendment as cruel and unusual punishment,[72] and may violate the Fourteenth Amendment as well.[73] In pursuing a remedy,[74] there must first be a showing that medical treatment for a given ailment could have been provided.[75]

A number of cases have stated that the proper test in determining whether an actionable claim for denial of medical care exists is whether prison officials abused their discretion in denying medical treatment to the inmate.[76] This would seem to place a considerable burden on the prisoner, in view of the complexities of medical proof, unless his complaint is obviously meritorious. Prisoner claims have been denied when they failed to allege facts indicating their health was in jeopardy and essential medical care was both needed and denied.[77] Claims have also been unsuccessful when they showed no more than a difference of opinion between the treating physician and the prisoner on the adequacy of the medical treatment rendered.[78]

One court has proposed a test for ascertaining whether a prisoner claim in this area rises to constitutional proportions, stating that in all successful cases the factual allegations as viewed by a layman have tended to show (1) an acute physical condition, (2) the urgent need for medical care, (3) failure or refusal to provide it, and (4) tangible residual injury.[79] Under this analysis, once the first two elements are present affirmative action by prison officials is constitutionally required. The rationale of

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[72] Coppinger *v.* Townsend, 398 F.2d 392 (10th Cir. 1968); Gittlemacker *v.* Prasse, 428 F.2d 1 (3d Cir. 1970) (improper or inadequate medical treatment may violate the 8th Amendment); Oaks *v.* Wainwright, 430 F.2d 24 (5th Cir. 1970) (improper/inadequate dental treatment).

[73] Riley *v.* Rhay, 407 F.2d 496 (9th Cir. 1969).

[74] Once administrative remedies have been exhausted, a prisoner can seek injunctive relief or mandamus. Damage awards under either the Federal Civil Rights Act or the Federal Tort Claims Act are also possible when the prisoner litigant can overcome the difficult problems of proof.

[75] Smith *v.* Schneckloth, 414 F.2d 680 (9th Cir. 1969) failure to treat prisoner for narcotic addiction not cruel and unusual punishment; no showing such treatment could have been provided.

[76] *E.g.*, Weaver *v.* Beto, 429 F.2d 505 (5th Cir. 1970); Haskew *v.* Wainwright, 429 F.2d 525 (5th Cir. 1970); Coppinger *v.* Townsend, 398 F.2d 392 (10th Cir. 1968); Stiltner *v.* Rhay, 371 F.2d 420 (9th Cir. 1967), *cert. den.*, 387 U.S. 922 (1967); Lawrence *v.* Ragen, 323 F.2d 410 (7th Cir. 1963). *See also* Koutos *v.* Prosse, 444 F.2d 166 (3d Cir. 1971), holding that an averment of denial of necessary medical treatment for an ear infection is tantamount to negligence and thus does not constitute deprivation of constitutional rights.

[77] Weaver *v.* Beto, 429 F.2d 505 (5th Cir. 1970).

[78] Coppinger *v.* Townsend, 398 F.2d 392 (10th Cir. 1968).

[79] Stiltner *v.* Rhay, 371 F.2d 420, 421 n.3 (9th Cir. 1967), *cert. den.*, 387 U.S. 922 (1967).

this case, *Stiltner* v. *Rhay*, would also be useful in gauging claims alleging improper medical care after the fact by substituting for the third element "failure to alleviate the acute physical condition."

The more difficult cases would be those in which the need for medical care is a continuing one, no residual injury has yet been incurred and the acuteness of the physical condition or the urgency of the need for medical care is disputed by the prison physician or other prison officials. It would seem that an actionable claim for proper medical care would exist when the possibility of tangible residual injury is greater than not, or though improbable, the residual injury if it did occur is of such magnitude that medical attention is warranted though the prisoner may be faking.

A medical treatment issue of constitutional proportions arising out of a military confinement facility is extremely doubtful considering the safeguards incorporated in the regulations, including the treatment of prisoners in disciplinary segregation.[80] Since the potential for abuse of prisoner rights to medical care exists in every confinement system alongside the potential for abuse of medical facilities by prisoners, the competing interests of protecting the right to medical care and eliminating malingering are best resolved by affording timely medical attention to all who request it. The provision for military sick call implicit in the regulations [81] are undoubtedly the most realistic approach to this problem. The lay opinions of custodial personnel as to the merits of prisoner allegations are not likely to preclude effective medi-

[80] AR 190–4, para 3–4(*d*) (Change No. 3, 10 Mar. 1971): "Medical attention will be furnished as indicated below:

(1) Prisoners reporting sick will receive medical attention at the confinement facility, where practicable, and those segregated for disciplinary reasons will be visited daily by a medical officer."

Id. at para 2–2*c*(3): "Disciplinary segregation will not be imposed as a disciplinary measure unless a medical officer renders a written opinion immediately prior thereto that the physical and mental health of the prisoner concerned does not preclude such action. Should a reduced diet be authorized in conjunction with the sedentary conditions of the prisoner in disciplinary segregation, the medical officer will also render a written opinion that such a diet will not be injurious to the health of the prisoner. Prisoners in disciplinary segregation will be visited once each day by a medical officer. . . ."

Army Reg. No. 210–170, para 49 (10 Apr. 1964): "*Medical attention.* At least minimum medical facilities, equivalent to an outpatient dispensary, will be established. Prisoners reporting sick will receive medical attention, and those in administrative or disciplinary segregation will be visited daily by a medical officer. If more extensive medical treatment is required than is available locally, the prisoner will be transferred to a hospital facility. . . ."

[81] *Id.*

cal treatment, because in every case of alleged serious injury or illness a doctor makes a prompt determination as to what treatment, if any, is warranted.

VI. PRISON DISCIPLINE AND PUNITIVE PROCEEDINGS

Prisoners may be forced to work at hard labor during their confinement as a penalty for crime even though the conviction is being appealed.[82] This is so despite the prohibitions of the Thirteenth Amendment against involuntary servitude and the Eighth Amendment forbidding cruel and unusual punishment.[83] However, the Eighth Amendment is violated whenever prison officials knowingly compel prisoners to perform physical labor beyond their strength or any labor that constitutes a danger to their lives or health.[84]

Under the provisions of the Eighth Amendment, a prisoner has a right to be free from needless brutality in its various manifestations.[85] But he is expected to adhere to prison discipline. Infractions of prison regulations subject a prisoner to further constitutionally permissible punishments imposed by the prison system itself, such as forfeiture of good time,[86] disciplinary segregation and/or a reduced diet for a given period.[87] If the prisoner's conduct is criminal, he is of course also liable to trial in formal criminal proceedings. The cases generally concern themselves with the severity of the punishment which may be imposed by the

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[82] United States *v.* Reynolds, 235 U.S. 133 (1914); Butler *v.* Perry, 240 U.S. 328 (1916).

[83] Wilson *v.* Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968); Draper *v.* Rhay, 315 F.2d 193 (9th Cir. 1963), *cert. den.*, 375 U.S. 915 (1963).

[84] Talley *v.* Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). *See* Holt *v.* Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *affirmed* 442 F.2d 304 (8th Cir. 1970), where the court felt that conditions in the Arkansas penitentiary were so poor that confinement alone was cruel and unusual punishment.

[85] *See* Comment, *Constitutional Law—Enforcement of Prison Discipline and its Effect Upon the Constitutional Rights of Those Imprisoned*, 8 VILL. L. REV. 379 (1963), at 381 (torture, beatings by hand or rubber hose held to constitute cruel and unusual punishment under the cases cited therein). *See generally*, Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966), and Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271 (1950); *but see* Tarlton *v.* Clark, 441 F.2d 384 (5th Cir. 1971), refusal to permit sexual relations with his wife does not violate the Eighth Amendment.

[86] *E.g.*, Smoake *v.* Willingham, 359 F.2d 386 (10th Cir. 1966); the courts will not consider lost good time claims unless restoration would entitle the prisoner to immediate release, Graham *v.* Willingham, 265 F. Supp. 763 (D. Kan.), *aff'd*, 384 F.2d 367 (10th Cir. 1967).

[87] *E.g.*, Burns *v.* Swenson, 430 F.2d 771 (8th Cir. 1970).

institution in light of the prisoner's conduct.[88] Not only may a prisoner be segregated for disciplinary reasons, but for security reasons as well, if by his pattern of conduct he has demonstrated that he is a threat to himself or to other prisoners.[89] Of course there must be a reason for placing a prisoner in a segregated facility or else the courts will order his release and return to the general prison population.[90]

Pursuant to the Eighth Amendment ban on cruel and unusual punishment, incorporated in Article 55 of the Uniform Code of Military Justice,[91] the current Army regulations list a comprehensive series of measures which are prohibited within confinement facilities.[92] When considered with authorized disciplinary

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[88] *E.g.*, Graham *v.* Willingham, 265 F. Supp. 763 (D. Kan.), *aff'd*, 384 F.2d 367 (10th Cir. 1967), where the court held that continuous segregation in maximum security for more than two years was both proper and lawful and did not constitute cruel and unusual punishment under the Eighth Amendment considering the prisoner's participation in extremely violent conduct during three separate periods of confinement. *But see* Sostre *v.* Rockefeller, 312 F. Supp. 863 (S.D. N.Y. 1970), where the court stated that, in order to be constitutional, considering the person involved, punitive segregation must be limited to 15 days and may be imposed only for serious infractions of the rules, and Carothers *v.* Follette, 314 F. Supp. 1014 (S.D. N.Y. 1970), holding that a deprivation of 60 days' accumulated good time because the prisoner criticized the prison management in a letter to his parents was unreasonable and disproportionate punishment. The validity of the latter two cases is now in doubt considering the recent ruling of the Second Circuit in Sostre *v.* McGinnis, 442 F.2d 178 (2d Cir. 1971), reversing the lower court's holding that solitary confinement for over 15 days is cruel and unusual punishment.

[89] Burns *v.* Swenson, 430 F.2d 771 (8th Cir. 1970).

[90] *E.g.*, Dabney *v.* Cunningham, 317 F. Supp. 57 (E.D. Va. 1970).

[91] *Cruel and unusual punishments prohibited.* "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited."

[92] AR 190–4, para 2–2*d* (Change No. 3, 10 Mar. 1971): "*Prohibited measures.* The following measures and those of a similar nature are prohibited.

(1) Clipping prisoner's hair to an excessive extent.

(2) The lock-step.

(3) Requiring silence at meals except while at attention or as a temporary control measure.

(4) Breaking rocks as a means of punishment or 'made' work.

(5) The use of the ball and chain.

(6) The use of irons, single or double, except for the purpose of safe custody.

(7) Removing prisoner's clothing or other debasing practices.

(8) Punishment by flogging, branding, tattooing on the body, or any other cruel or unusual punishment.

(9) Domicile in a tent as a means of punishment.

(10) Any strenuous physical activity or body position designed to place undue stress on the prisoner as a punitive measure."

control measures,[93] they provide a detailed framework that precludes any practice that would constitute cruel and unusual punishment under the current state of the law.

The current controversy in the courts centers about whether prison officials must provide any procedural safeguards to a prisoner who is liable to receive some punishment through a prison administrative proceeding as a result of his misconduct.

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[93] *Id.* at para 2–2 "*Administrative disciplinary and control measures.* Administrative disciplinary measures prescribed herein will be used for the purpose of insuring orderly administration and control; for protection of Goverment property; for the safety and well-being of prisoners and others; and for the correction of recalcitrant prisoners. The type and severity of administrative disciplinary measures imposed will be limited to those required to accomplish the foregoing purposes. Disciplinary segregation should be imposed for indefinite periods and prisoners will be released therefrom at any time it is apparent that control and correction of the individual has been accomplished. Disciplinary segregation and forfeiture of good time are major disciplinary measures, and will be imposed only for the more serious infractions or in the cases where lesser disciplinary measures have been found to be ineffective. Excessive use of disciplinary segregation as an administrative disciplinary measure serves to decrease its effectiveness. Imposition of administrative disciplinary measures will preclude trial by court-martial for the same infraction only if the infraction was minor in nature.

a. Authorized administrative disciplinary measures. Commanders of confinement facilities are authorized to impose one or more of the following administrative disciplinary measures upon persons confined under their jurisdiction for misconduct, action prejudicial to good order and discipline, or violations of rules and regulations.

(1) Reprimand or warning.

(2) Deprivation of one or more privileges.

(3) Extra duty on work projects not to exceed 2 hours per day and not to exceed 14 consecutive days. Extra duty will not conflict with regular meals, regular sleeping hours, or attendance at scheduled religious services.

(4) Disciplinary segregation normally not to exceed 15 days at any one period.

(5) Earned good conduct time and, where applicable, extra good time may be forfeited in accordance with AR 633–30.

. . . A reduced diet is authorized for use by commanders of confinement facilities consistent with the sedentary conditions of prisoners in disciplinary segregation. The reduced diet will include balanced portions of all items in the regular daily ration prepared and served other prisoners, with reduced amounts but not less than 2,100 calories daily, and with desserts omitted. The commander of the confinement facility or his designated officer representative will daily examine the serving of reduced diet menus to assure compliance with these requirements. . . .

"Protection of health and welfare of prisoners in close confinement.

(1) The detention of prisoners under conditions of administrative or disciplinary segregation for long periods of time is considered undesirable and will be avoided. Prisoners in disciplinary segregation or administrative segregation will be kept under close supervision. . . . Special precautions will be taken in the preparation, equipping, inspection, and supervision of administrative and disciplinary segregation to prevent escapes, self-injury, and other serious incidents or unhealthy conditions of confinement. . . ."

The courts have felt that a formal hearing, although desirable, is not constitutionally required,[94] and if such a hearing is provided it need not be given prior to segregation if the exigencies of the situation require immediate removal of the prisoner from the general population.[95] A recent Supreme Court decision, however, has made the validity of such precedents doubtful. In *Goldberg* v. *Kelly*,[96] the Court held that procedural due process under the Fourteenth Amendment requires that welfare recipients be afforded an evidentiary hearing before the termination of benefits. Justice Brennan, speaking for a majority of five justices, concluded that in the welfare pretermination hearing, rudimentary due process demanded certain minimum procedural safeguards. These safeguards include affording the recipient: timely and adequate notice and the opportunities to confront and cross-examine witnesses relied upon by the government, to retain an attorney if desired, and to present oral evidence to an impartial decision maker. The conclusion of the decision maker must rest solely on the legal rules and evidence adduced at the hearing. The decision maker should state the reasons for his determination and indicate the evidence he relied on. However, Justice Brennan pointed out that the hearing need not take the form of a judicial or quasi-judicial trial, nor include a complete record or comprehensive opinion.

Shortly before the Supreme Court decision in *Goldberg* v. *Kelly*, Chief Judge Wyzanski, speaking for the federal district court of Massachusetts seemed to anticipate the Court's decision. He decided that, as a matter of fairness required by the due process clause,[97] a prison hearing which may place a prisoner in solitary confinement or postpone his release date must: (1) advise the prisoner of the charge of misconduct, (2) inform the prisoner of the nature of the evidence against him, (3) afford the prisoner an opportunity to be heard in his own defense, and (4) reach

[94] *E.g.*, Burns *v.* Swenson, 430 F.2d 771 (8th Cir. 1970).

[95] *Id.* The timing of such a hearing, if initiated within a reasonable time after a prisoner has been unilaterally segregated would not be an issue of any importance, since the period of segregation prior to a hearing could be viewed as imposed for security purposes, necessary for the preservation of security and good order, as opposed to segregation imposed by the hearing as a disciplinary measure.

[96] 397 U.S. 254 (1970).

[97] Nolan *v.* Scafati, 306 F. Supp. 1, 3 (D. Mass. 1969). The Court distinguished between disciplinary actions when such hearings would be required, and summary actions imposed to quell a disturbance or a protective order against immediate risks. *Accord:* Kritsky *v.* McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970). *See also* Morris *v.* Travisone, 310 F. Supp. 857 (D. R.I. 1970); Rodriguez *v.* McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969).

its determination upon the basis of substantial evidence. The court decided that a prisoner appearing before a prison hearing does not have the constitutional rights of retaining an attorney, calling witnesses in his own behalf, or cross-examining witnesses, reasoning that affording a prisoner the latter two rights would be inappropriate in a prison setting because they would tend to place the prisoner on a level with prison officials and would have an adverse effect upon prison discipline and security.[98]

Subsequent to *Goldberg* v. *Kelly*, other district courts have expanded procedural due process safeguards to prisoners. In *Sostre* v. *Rockefeller* the district court paraphrased Justice Brennan's language in *Goldberg* in extending all of the *Goldberg* safeguards. On appeal the Second Circuit[99] disagreed with the district court's conclusion that all of *Goldberg's* procedural elements are constitutionally required in a formal proceeding, but did agree that due process requires that the prisoner be confronted with the accusation, be informed of the evidence against him, and afforded a reasonable opportunity to explain his actions.[100] In *Bundy* v. *Cannon*[101] the district court cited the Second Circuit's opinion in *Sostre* for the minimum due process requirements in disciplinary proceedings, and went on to discuss the requirement for a hearing before an impartial tribunal as a basic component of fundamental fairness. The court stated that this principle is violated whenever the same official assumes the dual responsibility of both initiating charges and subsequently determining whether misconduct has occurred and assessing the appropriate punishment.[102] In emphasizing the use of hearing officers drawn from outside the correctional institution as highly desirable, the court analogized such a procedure to the use of JAG officers in court-martial proceedings.[103]

Another district court disagreed with the Second Circuit in *Sostre* and concluded that disciplinary segregation is a "grievous loss" that warrants all of the procedural safeguards enumerated in *Goldberg*.[104] Pursuant to this opinion, San Quentin prisoners

[98] *Id.* at 4: "There are types of authority which do not have as their sole or even principal constituent, rationality. Parents, teachers, army commanders, and above all, prison wardens have the right to depend to a large extent (though not arbitrarily) upon habit, custom, intuition, common sense not reduced to express principles, and other forms of judgment based more on experience than on logic."

[99] Sostre v. McGinnis, 442 F.2d 178 (S.D.N.Y. 1971).

[100] *Id.* at 198.

[101] 328 F. Supp. 165 (D. Md. 1971).

[102] *Id.* at 172–73.

[103] *Id.* at 174.

[104] Clutchette v. Procunier, 40 U.S.L.W. 2031 (N.D. Cal. 6/21/71).

facing possible disciplinary segregation must be afforded seven days advance notice of the definite charge, the underlying facts and hearing date, counsel or an adequate counsel substitute, an impartial tribunal, a right of cross-examination, a right to present evidence and meaningful review.

While the courts seem to agree that prisoners must be protected against arbitrary and capricious action in the imposition of disciplinary measures, there are basic disagreements as to what due process safeguards must be provided. Considering that disciplinary hearings are predicated upon fact finding and substantial punishments may be imposed, *Goldberg* v. *Kelly* would seem to control such proceedings despite the reluctance of the Second Circuit to impose such safeguards because of uncertainty as to the impact on prison discipline. As the factual evidence is likely to be simple and precise, a factor noted in *Sostre*,[105] an administrative hearing incorporating *Goldberg* safeguards would still be a simple procedure involving notice of no more than 48 hours, appointed counsel, and an impartial hearing officer. No threat to discipline would exist where immediate segregation and restraint are imposed before the hearing in cases of violence.

Considering military disciplinary action in light of *Goldberg* v. *Kelly*, the present procedures fail to afford military prisoners those procedural due process safeguards set down by the Supreme Court. Paragraph 2–2*e*, Army Regulation 190–4, provides:

> The imposition of administrative disciplinary measures will be subject to the approval of the commander of the confinement facility in each case. In disciplinary barracks and correctional training facilities, discipline and adjustment boards composed of at least three officers will be established to consider and recommend action to be taken. At installation confinement facilities, the correctional officer will perform the function of the discipline and adjustment board and will make recommendations to the installation commander. The use of self-governing prisoner groups is prohibited.

By failing to provide even that rudimentary procedural due process outlined by Judge Wyzanski, that of affording the military prisoner adequate notice and an opportunity to be heard by an impartial hearing officer, it would seem that the above provisions of AR 190–4 are in need of immediate revision. However, some distinctions should be made as to the types of situations in which the *Goldberg* precepts would apply. Relatively minor misconduct[106] for which informal punishment (*i.e.*, an oral repri-

[105] Sostre *v.* McGinnis, 442 F.2d 178, 196 (2d Cir. 1971).

[106] Army Reg. No. 210–170, para 62*c* (10 Apr. 1964) (applicable to the Disciplinary Barracks) sets forth several examples of major and minor

mand), or a mild authorized punishment [107] would be imposed is not of such magnitude as to require *Goldberg* safeguards. It should also be noted that, in contrast to the procedure for installation confinement facilities for which paragraph 2–2*e* of AR 190–4 furnishes the only guidance, the current Disciplinary Barracks procedure is more specific. Under Army Regulation 210–170,[108] a

violations: (1) *Minor violations.* Many violations of disciplinary barracks rules by prisoners can be corrected by a warning from the guard or immediate supervisor without the necessity of formal disciplinary action. A local record may be maintained of such warnings, but they will not be entered on the Record of Conduct. . . . When prisoners fail to heed such warning or commit a series of minor violations, or where it is apparent that the minor violation is connected with some more serious situation, it is necessary that the matter be referred by official report for disciplinary action. Examples of minor violations are:

(*a*) Boisterousness.
(*b*) Evading work.
(*c*) "Horseplay."
(*d*) Loitering.
(*e*) Out of bounds.
(*f*) Personal untidiness.
(*g*) Unsanitary condition of cells.
(*h*) Withholding library books.

(2) *Major violations.* When a prisoner commits a major violation, a disciplinary report covering the violation, in complete details will be submitted, in writing, in each instance. Examples of major violations are:

(*a*) Attempting to escape.
(*b*) Fighting.
(*c*) Homosexual assault.
(*d*) Insolence.
(*e*) Insubordination.
(*f*) Missing count.
(*g*) Possession of weapons.
(*h*) Racketeering.
(*i*) Refusing to work.
(*j*) Stealing.

[107] A reprimand or warning, or deprivation of privileges (AR 190–4, para 2–2) (Change No. 3, 10 Mar. 1971).

[108] Army Reg. No. 210–170, para 62*c*(5) (10 Apr. 1964):

"(*a*) *Discipline and adjustment board procedures.* The rules and procedures of the discipline and adjustment board will be established by the commandant, consistent with the provisions of AR 633–5 [now AR 190–4] and this regulation. Prisoners will be called before the board, and charges will be read to them. Each prisoner will be given an opportunity to be heard in detail in his own defense. When necessary, other witnesses will be heard by the board. It is the duty and the responsibility of the board to obtain and consider all relevant facts in each case. The prisoner will be removed from the board room during discussion and determination of guilt or innocence and penalties to be imposed, if any. In the imposition or disciplinary action, the prisoner's previous conduct, mental and physical condition, attitude, and other pertinent factors will be fully considered. The severity of penalties imposed should be applied progressively in order that there remain more severe penalties which can be imposed for future misconduct. Normally, maximum penalties will not be imposed upon first offenders. Members of the discipline and adjustment board will be extremely careful to be impartial

prisoner does have a timely opportunity to be heard prior to imposition of formal punishment. If this provision of the Disciplinary Barracks regulation is revised to incorporate the *Goldberg* safeguards by extending to prisoners the opportunity to confront and cross-examine witnesses and to retain an attorney if desired, and requiring the discipline board to state the reasons for the determination and the evidence relied on, a prisoner will be afforded adequate due process. To insure uniformity and to preclude constitutionally impermissible local deviation, such a revised procedure based on the current Disciplinary Barracks practice should be incorporated in Army Regulation 190–4.

The differentiation between segregation imposed for security reasons and disciplinary segregation, discussed earlier in this section, should be noted. It would be a constitutionally valid exercise of a corrections officer's authority to segregate a violent prisoner for a reasonable period prior to the administrative determination of appropriate disciplinary measures so that good order within the confinement facility would be preserved. Institutional necessity warrants unilateral segregation of violent prisoners in the interim without the procedural safeguards of *Goldberg*. The current regulations provide the necessary authority.[109]

Apart from the issue of what procedural safeguards are to be furnished in prison disciplinary proceedings is the issue of affording adequate procedural safeguards in those proceedings concerning restoration to duty of military prisoners, or mitigation,

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and to impose fair, just, and reasonable penalties of a corrective rather than punitive nature. . . .

(*b*) *Expediting action.* Investigation or other action necessary to bring the prisoner before the discipline and adjustment board, court-martial, or other disposition will be completed expeditiously. In order that corrective action may be taken with minimum delay, normally all cases refered [sic] to the discipline and adjustment board will be considered and acted upon within 24 hours after disciplinary reports have been received by the director of custody (Sundays and holidays not included). . . ."

[109] *Id.* at 62*c*: "(4) *Segregation pending disciplinary action.* Temporary detention of prisoners in administrative segregation may be authorized by the director of custody, or other commissioned officer designated by the commandant, where such action is necessary for the control and safekeeping of prisoners pending investigation and disposition. At times, it may be necessary for guard personnel to bring violators direct to the director of custody, especially where serious violations are involved."

AR 190–4, para 2–2*b* (Change No. 3, 10 Mar. 1971): "(3) A prisoner may be placed in administrative segregation during the preliminary investigation of a case in which he is involved only when the commander of the confinement facility deems such action essential to the expeditious conduct of the investigation. In such cases the individual will be released from administrative segregation immediately after the purpose of such restraint has been served."

remission and suspension of their sentences. Although the present regulations [110] do not provide for hearings of the scope considered essential to administrative due process in *Goldberg* v. *Kelly*, an obvious distinction between disciplinary and clemency proceedings is that the latter concerns the extension of benefits to the prisoner, rather than the withdrawal of rights or privileges. Whether this distinction is valid is questionable considering the importance of the benefits that may be conferred, and the fact that prisoner status itself may be terminated as a result of these proceedings. It can be argued that although a prisoner has no right to clemency, he does have a right to full and impartial consideration of his claim for benefits available under the regulations which entitles him to the *Goldberg* procedural safeguards.

VII. THE STATUS OF THE MILITARY PRISONER

Up to this point in the discussion, military prisoners have been considered as a homogenous group. In fact they are categorized according to rank or the stage in the judicial process at which they are located during incarceration. Detained,[111] officer,[112] adjudged,[113] and sentenced [114] are the status terms used for the categories of military prisoners. Detained and adjudged prisoners are often referred to as unsentenced prisoners, and are segregated from sentenced prisoners in billets and employment unless they waive the right to segregation.[115] Officer prisoners are quartered and messed separately, perform only those duties normally performed by officers of their rank and in general retain all privileges

[110] See Army Reg. No. 633–35, para 3 (12 Jun. 1967). Restoration of military prisoners sentenced to confinement and discharge, which permits prisoners desiring restoration to duty to make an oral or written presentation to the restoration board, and Army Reg. No. 633–10 (21 May 1968), mitigation, remission, and suspension of sentences, which contemplates an *ex parte* procedure.

[111] AR 190–4, para 2–1(1) (Change No. 3, 10 Mar. 1971): "An enlisted military person or civilian held at an installation confinement facility awaiting filing of charges, disposition of charges, trial by court-martial, or action by the convening authority on the sentence adjudged by a court-martial."

[112] *Id.* at para 2–1(2): "A commissioned or warrant officer of the Armed Services of the United States, on active duty as a commissioned or warrant officer, who is confined prior to any court-martial sentence being ordered into execution. . . ."

[113] *Id.* at para 2–1(3): "An enlisted military or civilian in confinement pursuant to sentence by a court-martial which, as approved by the convening authority, includes confinement which has not been ordered executed and is awaiting completion of appellate review."

[114] *Id.* at para 2–1(4): "A prisoner whose sentence to confinement has been ordered into execution by appropriate authority."

[115] *Id.* at para 2–1*d*.

of rank "except those determined by the commanding officers of the confinement facility to be necessarily denied by reason of confinement." [116]

Two recent federal district court decisions suggest that unsentenced prisoners must continue to be segregated from sentenced prisoners, despite the recommendations of a recent study of the Army confinement system.[117] Both cases, from the Western District of Missouri,[118] concluded that treating unconvicted inmates as convicts would violate their constitutional rights, absent an intentional, deliberate policy of being more lenient whenever practical in the treatment of the unconvicted, particularly as to available institutional privileges: [119]

> While the Constitution authorizes forfeiture of some rights of convicts, it does not authorize treatment of an unconvicted person (who is necessarily presumed innocent of pending and untried criminal charges) as a convict.[120]

If convicted prisoners retain all of their constitutional rights except those withdrawn or diluted by institutional necessity, one may well wonder what hazy, shrinking middle ground the unconvicted prisoner may occupy between the unaccused and the convicted. The unsentenced military prisoner's niche is more readily apparent than that of his civilian counterpart,[121] as the former is subject to military control and discipline.

Under Article 13 of the Code [122] and the Manual for Courts-Martial,[123] no person may be subjected to punishment while being

[116] *Id.* at para 2–1(2).

[117] *Report of the Special Civilian Committee for the Study of the United States Army Confinement System* (1970), p. 33.

[118] Tyler *v.* Ciccone, 229 F. Supp. 684 (W.D. Mo. 1969); Parks *v.* Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968).

[119] *Id.*

[120] Tyler *v.* Ciccone, 299 F. Supp. 684 (W.D. Mo. 1969) (federal unconvicted prisoner).

[121] *See* Parks *v.* Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968), which suggests that forcing an unconvicted civilian prisoner to work would be involuntary servitude prohibited by the thirteenth amendment and a violation of the Eighth Amendment.

[122] *Punishment prohibited before trial.*

"Subject to section 857 of this title (article 57), no person while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

[123] MANUAL FOR COURTS-MARTIAL, 1969 (REVISED EDITION), paras 18*b*(3) and 125. Pursuant to Article 57(d) of the Code, the Manual provides for deferral of a sentence to confinement which has not been ordered executed in paragraph 88*f*.

held for trial, or whose sentence has not been approved and ordered executed. In *United States* v. *Bayhand* [124] the Court of Military Appeals concluded that Article 13 requires stockade officials to respect the rights of the unsentenced by distinguishing between unsentenced and sentenced prisoners with respect to their treatment. Because the only valid ground for ordering confinement prior to trial is to insure the continued presence of the accused, imposing punitive work assignments on unsentenced prisoners is illegal. Persons awaiting trial, however, can be legally required to perform military duties to the same extent as those soldiers available for general troop duty. The court recognized that certain work assignments would be proper for both the unsentenced and the sentenced, and listed several factors to consider in determining whether work is intended as punishment:

> (1) Was the accused compelled to work with sentenced prisoners?
> (2) Was he required to observe the same work schedules and duty hours?
> (3) Was the type of work assigned to him normally the same as that performed by persons serving sentences at hard labor?
> (4) Was he dressed so as to be distinguishable from those being punished?
> (5) Was it the policy of the stockade officers to have all prisoners governed by one set of instructions?
> (6) Was there any difference in the treatment accorded him from that given to sentenced prisoners? [125]

So long as confinement authorities enforce the distinction between sentenced and unsentenced prisoners in work assignments, the court has permitted commingling of the categories in certain extraordinary or unusual work situations that are normally nonrecurring, such as using both sentenced and unsentenced prisoners to fill in a secret escape tunnel in the stockade.[126] When the factors listed in *Bayhand* are applied to a factual situation and it can be determined that confinement authorities have failed to treat sentenced and unsentenced prisoners differently, the court has held that such treatment of a prisoner in pretrial confinement amounts to punishment without due process of law in violation of Article 13 of the Code.[127]

For the military prisoner, the dual status of soldier and prisoner continues during incarceration until he is restored to duty, when he loses his prisoner status, or until a punitive discharge

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[124] 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).
[125] *Id.* at 21 C.M.R. 92.
[126] United States *v.* Phillips, 18 U.S.C.M.A. 230, 39 C.M.R. 230 (1969).
[127] United States *v.* Nelson, 18 U.S.C.M.A. 177, 39 C.M.R. 177 (1969).

imposed by court-martial is executed when he loses his soldier status but continues to be subject to the Uniform Code of Military Justice [128] though no longer a member of the armed forces. Since court-martial jurisdiction continues as prisoners are persons "in custody of the armed forces serving a sentence imposed by a court-martial," [129] it has been held that interrupting this military status by transferring a prisoner to a federal penitentiary does not terminate the status permanently. Military status again attaches should the prisoner be returned to a military confinement facility to serve a second court-martial sentence [130] since he is returned to military custody and again falls within the classification of Article 2(7) of the Code.

Female prisoners, of course, are not confined in facilities used for confinement of male prisoners. Their initial temporary custody is secured within either a suitable military or civilian facility.[131] Female military prisoners whose approved sentences are at least one year normally are transferred to the federal women's penitentiary at Alderson, West Virginia. Sentences of female military prisoners which as approved adjudge confinement for less than one year are normally remitted.[132] One may well speculate as to whether this policy is inherently discriminatory and a denial of

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[128] United States *v.* Nelson, 14 U.S.C.M.A. 93, 33 C.M.R. 305 (1963); Kahn *v.* Anderson, 255 U.S. 1 (1921); UNIFORM CODE OF MILITARY JUSTICE, art. 2(7).

[129] UNIFORM CODE OF MILITARY JUSTICE, art. 2(7).

[130] United States *v.* Ragan, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963), holding Art. 2(7) of the Code a constitutional exercise of Congressional power to make rules and regulations for the government of the armed forces.

[131] AR 190–4, para 1–3(6) (Change No. 3, 10 Mar. 1971). "Female prisoners will not be confined in facilities used for confinement of male persons.

(*a*) If confinement of female persons is necessary, the apprehending authority will communicate with his next higher headquarters for disposition instructions. Normally, such disposition will be one or a combination of the following:

1. Immediately place such female persons in the custody of the commanding officer of the nearest activity of the Army where there is adequate housing and supervision of female persons; or,

2. If no such activity is within reasonable distance, request for assumption of temporary custody will be made to the nearest organization of the Armed Service where female persons are housed; or,

3. If neither of the foregoing is applicable, arrangements for temporary custody on a reimbursement basis will be made with civilian authorities having suitable approved facilities for the detention of female persons . . ."

[132] *Id.* at para 1–3(6). "(*b*) The confinement portion of a court-martial sentence of a female person which, as approved by the convening authority, adjudges confinement for less than 1 year, should be remitted by the convening authority."

the equal protection of the laws to their male counterparts or violative of due process under the Fifth Amendment.[133]

VIII. CONCLUSIONS AND RECOMMENDATIONS

Too frequently the prisoner is viewed as placed in an institutional purgatory in which he can only hope for some limited "privileges" since his constitutional protections have been withdrawn as part of his punishment. Although the Army has disavowed a strict punitive policy and ostensibly committed itself to the concept of rehabilitation, the military prisoner is denied certain attributes of citizenship, such as the right to mail a letter to anyone he chooses, which are enjoyed by all others. This is a doubtful starting point on the road to release and participation in society as a functioning citizen. Confinement personnel must be made aware of the fact that their discretion is limited because prisoners retain those constitutional rights in confinement that can be accommodated to institutional necessity. In addition, present regulations governing the operation of military confinement facilities should be carefully examined and revised to include safeguards against the deprivation of the constitutional rights of prisoners under the new and developing case law. Specific changes in the confinement regulations are warranted in view of the new judicial philosophy.

Specific authority should be granted to corrections officers to segregate the prison population racially when violence is imminent. Censorship and inspection of all outgoing mail, and restrictions on the number and type of correspondents, should be eliminated, because they serve no particular institutional purpose that would justify retention in the face of the First Amendment. Even in those cases where prisoner's correspondence could be labeled as obscene, considering the difficulty that both lawyers and courts have had with this problem, confinement personnel are not adequately equipped to deal with the problem. They should focus their attention on the prison population rather than

[133] Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances. Pace *v.* Alabama, 106 U.S. 583 (1883), and forbids all invidious discrimination though it does not require identical treatment for all persons without recognition of differences in relevant circumstances. Yick Wo *v.* Hopkins, 118 U.S. 356 (1886). Although the equal protection clause as part of the Fourteenth Amendment refers to state action, the Supreme Court has stated that discrimination may be so unjustifiable as to be violative of Fifth Amendment due process, it being unthinkable that the federal government would be under a lesser duty. Bolling *v.* Sharpe, 347 U.S. 497 (1954).

concern themselves with the sensitivities of society at large. Postal inspectors would be in a better position to screen such writings, assuming that they have the authority. Should a correspondent complain that he has been subjected to threats by a prisoner, this can best be handled by disciplinary action under Article 134 of the Code. Unfounded allegations of mistreatment and inadequate facilities, whether addressed to officials, news media, or private citizens can be refuted, and are an inconvenience mandated by the First Amendment right to petition for redress of grievances, freedom of the press, and the right of free speech. The inspection of incoming mail, however is justified by the need to maintain prison security and eliminate drugs, weapons, escape implements and inflammatory writings.

Limitations on the type of visitors should be eliminated. In the usual case, a person who wants to visit a prisoner has a genuine interest in his welfare and can aid rehabilitative efforts. Specific individuals could be prevented from visiting when qualified medical personnel can show that, in view of the prisoner's emotional immaturity or other mental factor the visitor would seriously hamper rehabilitation.

The current procedures for imposition of punitive measures should be amended so that whenever a serious infraction of the rules has been committed, a prisoner could not be subjected to punishment by confinement authorities without due process of law. Certainly no punishment at an installation stockade should be effected by a terse recommendation to the commander by the corrections officer on a Disposition Form resulting in rubber stamp approval. In practice, *Goldberg* would allow a prisoner to present his version of an incident and require a reasoned elaboration by the commander or his designee of the grounds for punishment. The local Staff Judge Advocate would not be called except in the occasional case when a prisoner desires to retain an attorney at his own expense.

Provisions pertaining to sentenced females should be amended so that in the event a sentence of less than one year is adjudged, the sentence would be actually served at an appropriate civilian institution. This would eliminate the present discrimination based on the sex of the offender.

The basis of any restriction on prisoners' rights should be necessity: the need of maintaining security, discipline and good order. Necessity can also be said to encompass any valid institutional objective, such as rehabilitation. If these terms are too elusive, perhaps "necessity" can be paraphrased as "what is re-

quired properly to manage large groups of people in a limited area when freedom of movement has been withdrawn and there must be strict compliance with authority." For example, is it essential to the proper management of a stockade that the corrections officer act as a postal inspector? Is the discipline of a confinement facility undermined by allowing a prisoner to complain to a newspaper? In the analysis not only must prisoners' rights be accommodated to institutional needs, but to the rights of other persons in society in contact with the institution as well.

In light of the issues which have been discussed, military lawyers must extend their functions in criminal matters beyond the formal judicial process and grasp the legal framework governing the military prisoner within the stockade fenceline. As part of a comprehensive preventive law program, a reexamination of local confinement practices is necessary to insure installation facilities are operating within constitutional limits and to determine where such practices may be liable to judicial attack in light of the issues discussed in this article. A real challenge exists in this area because military confinement practices can be expected to receive attention from the courts wherever the constitutional rights of prisoners are even tangentially affected. Because the older court decisions may no longer be valid, and the present guidelines are recent innovations, the military lawyer must call into play the most unique resource of his profession: the ability to predict the outcome of future litigation and advise others to plan accordingly.

THE UNITED STATES COURT OF MILITARY APPEALS: ITS ORIGIN, OPERATION AND FUTURE*

By Captain John T. Willis**

Much of the history of military justice in the last two decades has been written in the decisions of the United States Court of Military Appeals. The author examines the creation and early years of "the Supreme Court of the Military." Particular consideration is given to the Court's efforts to define its powers of review through such shifting terms as "military due process," "harmless error," and "general prejudice."

I. INTRODUCTION

Over 16,000,000 men and women served in the armed forces of the United States during the Second World War.[1] Upon their return home from the war the American public demanded the reform of military justice after hearing numerous stories, factual and fictitious, about injustices committed by Americans on other Americans in the name of military necessity, good order, and discipline.[2] Over 2,000,000 courts-martial were convened during the war [3]—one court-martial for every eight servicemen. By the end of the war one hundred and forty-one persons had been

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*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any governmental agency.

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[1] STATISTICAL ABSTRACT OF THE UNITED STATES, U.S. Dep't. of Commerce, table No. 385, at 256 (1970) [hereinafter cited as STATISTICAL ABSTRACT].

[2] For a collection of newspaper editorials reflecting the demand for the reform of military justice *see Hearings on H.R. 2575 Before the Subcomm. of the House Comm. on Military Affairs*, 80th Cong., 1st Sess., at 2166–2175 (1947).

[3] This statistic represents an addition of available Army and Navy data for the period 1942 through 1945. Army figures were taken from the Report to Hon. Wilbur M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, 251 (Jan. 18, 1960) [hereinafter cited as POWELL REPORT]. Navy figures were taken from information provided by Col. John E. Curry, USMC, for Felix E. Larkin, Ass't. General Counsel, Sec. of Defense, Oct. 11, 1948, in III Papers of Professor Morgan on the Uniform Code of Military Justice, on file in Treasury Room, Harvard Law School Library [hereinafter cited as MORGAN PAPERS]. The following table has been compiled from these sources.

executed pursuant to courts-martial sentences.[4] Over 45,000 servicemen were imprisoned under sentences adjudged by courts-

Courts-Martial	*1942*	*1943*	*1944*	*1945*	*Totals*
NAVY					
General	4,262	8,388	19,562	21,500	53,712
Summary	25,723	69,526	93,700	70,337	259,286
Deck	29,947	75,429	113,742	90,971	310,089
Totals	59,932	153,343	227,004	182,808	623,087
ARMY					
General	3,725	14,782	22,815	25,671	66,993
Special	38,418	117,697	204,123	175,591	535,829
Summary	65,919	190,670	292,172	279,146	827,907
Totals	108,994	323,149	519,110	480,408	1,430,729
TOTALS	167,994	476,492	746,114	663,216	2,053,816

Even these figures do not indicate the full magnitude of courts-martial arising out of World War II. The above data does not include Navy figures for the last three months of 1945 and many servicemen were tried in later years for offenses committed during the hostilities. The post-war court-martial statistics of the Army indicates the continuing effects of World War II and provides one reason why the issue of military justice was kept before the American public.

ARMY	*1946*	*1947*	*1948*	*Totals*
General	35,977	9,977	9,561	55,515
Special	50,402	44,130	36,971	131,503
Summary	101,625	97,104	81,794	280,523
Totals	188,004	151,211	128,326	467,541

It should be noted that some comments on World War II courts-martial may only refer to the 120,705 general courts-martial as only those courts could impose a sentence greater than six months' confinement. For comment on the magnitude of courts-martial in comparison with civilian criminal trials, *see* Karlen and Pepper, *The Scope of Military Justice*, 43 J. CRIM. L.C. & P.S. 3 (1952). For an analysis and understanding of the military prisoner of World War II, *see* the White Report, A Study of Five Hundred Naval Prisoners and Naval Justice (1946); Chappell, *The Treatment of Naval Offenders, War and Post-War*, 38 J. CRIM. L.C. & P.S. 342 (1947); MacCormick and Evjen, *Statistical Study of 24,000 Military Prisoners*, FED. PROBATION, Apr.–Jun. 1946, at 6.

[4] 95 CONG. REC. 5724 (1949) (remarks of Congressman Vinson). The number of executions administered by the military is usually cited as over 100. However, newspaper accounts in April 1946 indicate that a report of a subcommittee on the National War Effort of the House Military Affairs Committee, intended for sole use of the full committee, was leaked to the press and revealed 142 executions were carried out by the military during World War II, *supra* note 2. STATISTICAL ABSTRACT, table no. 238, at 158, discloses that 148 executions were carried out by the military between 1942 and 1950. One hundred and six were hanged for murder; the rest executed for rape except for the desertion of Private Eddie D. Slovik. For a detailed account of the first execution for desertion since 1864 and an insight into the background of Eddie Slovik, *see* W. HUIE, THE EXECUTION OF PRIVATE SLOVIK (1954). *See also* Wiener, *Lament for a Skulker*, 4 COMBAT FORCES J. 33 (1954). All the executions were by the Army. The Navy has not executed a man pursuant to a court-martial sentence since the hanging of 18-year-old Midshipman Philip Spencer and two companions for an alleged mutiny aboard the USS Somers in 1842. E. BYRNE, MILITARY LAW, A HANDBOOK FOR THE NAVY AND MARINE CORPS, 14–17 (1970).

martial as the Second World War ended.[5] The conviction rate was close to 97% in Army courts-martial.[6] The statistics, while striking in themselves, only convey part of the meaning of "drumhead justice." [7] In 1946, hearings were held by the War Department Advisory Committee on Military Justice in eleven major cities revealing that the complaints about military justice centered on the abuses of command control and excessive courts-martial sentences.[8] Although the Committee found that the innocent were rarely convicted, a significant number of commanding officers were found to have so influenced the court-martial proceeding that the capacity for a fair and impartial trial was lost.[9] Regarding the sentencing practices of courts-martial the Vanderbilt Committee reported: "In fact, some sentences border on the fantastic. A 75 year sentence is not unknown, and 50 or 25 year sentences for infractions of discipline are not unknown." [10] The wartime experiences of the former Governor of Vermont, Ernest W. Gibson, provide a glimpse into the operation of the military justice system of World War II:

> [W]e were advised, not once but many times on the Courts that I sat on, that if we adjudged a person guilty we should inflict the maximum sentence and leave it to the Commanding General to make any reduction. . . . I was dismissed as a Law Officer and Member of a General Court-Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted—yet the evidence didn't warrant it. I was called down and told that if I didn't convict in a greater number of cases I would be marked down

[5] This figure is the most often cited by commentators on military justice. However, it too is misleading. The White Report, *supra* note 3, at 2, states that 15,000 naval personnel were in confinement on January 1, 1946. *MacCormick and Evjen, supra* note 3, at 7, show 34,766 men confined as the result of Army general courts-martial in October 1945. An addition of these two figures yields approximately 49,0000 servicemen in confinement at the end of the war *excluding* those Army personnel confined pursuant to the far more numerous special and summary courts-martial.

[6] POWELL REPORT at 251.

[7] Keefe, *Drumhead Justice: Our Military Courts*, READERS' DIGEST, Aug. 1951, at 37. Rosenblatt, *Justice on a Drumhead*, 162 NATION 501 (1946).

[8] Report of War Dep't Advisory Comm. on Military Justice to the Secretary of War (1946) [hereinafter cited as VANDERBILT COMM. REPORT]. Secretary of War Patterson appointed this committee, composed of members of the American Bar Association, on March 25, 1946. After extensive hearings its 2519 page report was submitted on December 13, 1946. For comment on the work of the Vanderbilt Committee see 33 A.B.A.J. 40 (1947); Holtzoff, *Administration of Justice in the U.S. Army, Proposed by the War Department*, 33 VIR. L. REV. 269 (1947); Wallstein, *The Revision of the Army Court-Martial System*, 48 COLUM. L. REV. 219 (1948).

[9] VANDERBILT COMM. REPORT at 6–7.

[10] *Id.*, at 3.

> in my Efficiency Rating; and I squared right off and said that wasn't my conception of justice and that they had better remove me, which was done forthwith."

The American experiences of the First World War had produced similar outcry and outrage about military justice but Congress enacted little reform.[12] However, the post World War II Congress was eventually moved to unprecedented reform by the pressure generated by the American public. Congressman Rivers noted:

> [E]very Member of this House, during the years, has been deluged with complaints of autocracy in the handling of these courts-martial throughout the Armed Forces. Everybody has had complaints and they were just complaints."

The feelings of many Congressmen were expressed by Senator Wayne Morse:

> I do not like this idea in this new era in which we are living of building up one justice system here for men in uniform and another one for so-called free citizens. You cannot keep a civilian Army, in my judgment, under two systems of justice. Differences, I recognize there will be, but I think the military has gone entirely too far in the direction of a system of justice we cannot reconcile with what I think are some basic guarantees of a fair trial."

The court-martial system of the Second World War was strikingly similar to the rules and regulations which governed the conduct of the Colonial Army. Early American military justice was not, surprisingly, adopted from the British Articles of War and the British Naval Articles.[15] With minor revision the Continental Congress adopted the British Articles of War on June

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[11] Letter from Ernest W. Gibson to Edmund M. Morgan, Nov. 18, 1948, IV MORGAN PAPERS.

[12] *See generally Hearings on S. 5320 Before the Senate Comm. on Military Affairs*, 65th Cong., 3d Sess. (1919); S. ULMER, MILITARY JUSTICE AND THE RIGHT TO COUNSEL 39–50 (1970) (synopsis of newspaper and congressional controversy over military justice). For criticism of World War I military justice *see* Ansell, *Military Justice*, 5 CORNELL L. REV. 1 (1919); In reply, Bogert, *Courts-Martial: Criticisms and Proposed Reforms*, 5 CORNELL L. REV. 18 (1919); Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52 (1919).

[13] 94 CONG. REC. 163 (1948) (remarks by Congressman Mendel Rivers on Elston Act).

[14] Remarks of Senator Wayne Morse in *Hearings on S. 857 and H.R. 4080 Before Subcomm. of the Senate Comm. On Armed Services*, 81st Cong., 1st Sess. 84 (1949) [hereinafter cited as 1949 HEARINGS].

[15] G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 1–12, 339–44 (3d ed. rev. 1915) [hereinafter cited as DAVIS]. W. WINTHROP, MILITARY LAW AND PRECEDENTS 4–13, 47–64 (2nd ed. rev. 1896) [hereinafter cited as WINTHROP].

30, 1775.[16] These articles were amended on November 7, 1775,[17] and replaced on September 20, 1776.[18] On September 29, 1789, the Congress of the United States made the existing Articles of War [19] applicable to the Army until their repeal in 1806.[20] Prior to the Second World War the Articles of War for the Army underwent noteworthy revision in 1874,[21] 1916,[22] and 1920.[23] The first American Naval Articles were approved by the Continental Congress on November 28, 1775,[24] and were likewise derived from their British counterpart. These provisions were continued by the Congress of the United States in 1797 [25] and their only major revision prior to World War II was in 1862.[26] The World War II "GI" was essentially subject to a 160-year-old criminal code that provided no right to trial by peers, that was largely administered by men untrained in the law, and that was closely controlled by a commander whose natural and primary interest was the maintenance of good order and discipline within his command.[27]

[16] Resolution of June 30, 1775, II JOURNALS OF THE CONTINENTAL CONGRESS 111 (Ford ed. 1905) [hereinafter cited as JCC].

[17] Resolution of November 7, 1775, III JCC 330.

[18] Resolution of September 20, 1776, V JCC 788.

[19] Act of September 29, 1789, ch. 25, sec. 4, 1 Stat. 96.

[20] Act of April 10, 1806, ch. 20, arts. 1–101, 2 Stat. 359 [hereinafter cited as ARTICLES OF WAR, 1806].

[21] Act of June 20, 1874, ch. 5, sec. 1342, arts. 1–128, 18 Stat. 113 [hereinafter cited as ARTICLES OF WAR, 1874].

[22] Act of August 29, 1916, ch. 418, sec. 3, arts. 1–121, 39 Stat. 650 [hereinafter cited as ARTICLES OF WAR, 1916].

[23] Act of June 4, 1920, ch. 227, sec. 1, arts. 1–121, 41 Stat. 759 [hereinafter cited as ARTICLES OF WAR, 1920].

[24] Resolution of November 28, 1775, III JCC 378.

[25] Act of July 1, 1797, ch. 8, 1 Stat. 525.

[26] Act of July 17, 1862, ch. 204, arts. 1–25, 12 Stat. 603 (revised and renumbered in Rev. Stat., tit. XV, sec. 1624, arts. 1–60, (1874); minor additions were made in 1893, 1895, 1909, and 1916) [hereinafter cited as NAVAL ARTICLES].

[27] Trial by court-martial meant trial by a board of officers. Legally trained counsel was not required for the accused or the government and the senior officer on the court, most likely a non-lawyer, presided over the proceedings. The commander ordered the accused to trial, appointed the court members, appointed government and defense counsel, and reviewed the findings and sentence of the court-martial. Citations to the various Articles of War could be given but for military view of World War II court-martial *see* F. WIENER, MILITARY JUSTICE FOR THE FIELD SOLDIER, (2d ed. rev. 1944). (Col. Wiener unabashedly states the function of courts-martial as an instrument of the commander for the maintenance of discipline as he constantly reminds his readers, future court-members, to be aware of the commander's powers and to expect unfavorable reaction from lenient sentences); for critical comment on the lack of lawyers and the natural consequences of unbridled command discretion see Karlen, *Lawyers and Courts-Martial*, 1946 WIS. L. REV. 240 and *The Personal Factor in Military Justice*, 1946 WIS. L. REV. 394.

Despite the exercise of a judicial function in depriving persons of life, liberty, and property, the administration of military justice developed independently from civilian justice in the United States. Major General Davis, a former Judge Advocate General of the Army, expressed the basis for this separation in his Treatise on Military Law:

> Courts-martial are no part of the judiciary of the United States, but are simply instrumentalities of the executive power. They are creatures of order; the power to convene them, as well as the power to act upon their proceedings being an attribute of command.[28]

In 1857 the Supreme Court of the United States had embraced this doctrine of separation in *Dynes* v. *Hoover*.[29] Citing the Constitutional provisions for Congressional and Presidential control over the military,[30] Justice Wayne observed:

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other.[31]

This decision solidified the limited review of courts-martial by federal courts [32] and served as a basis for holding that military

[28] DAVIS at 15.

[29] 61 U.S. (20 How.) 65 (1857).

[30] U.S. CONST. art. I, sec. 8 authorizes Congress "[t]o define and punish . . . Offenses against the Law of Nations; To declare War . . . To raise and support Armies . . . To provide and maintain a Navy; To Make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States. . . ." "U.S. CONST. amend. V, also provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ." U.S. CONST., art II, sec. 2 states in part, "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . ."

[31] 61 U.S. (20 How.) 65, 79 (1857).

[32] Earlier cases in hearing claims for damages against persons who had acted in accordance with the findings and sentence of a court-martial also only considered the jurisdiction of the court-martial. *See* Martin *v.* Mott, 25 U.S. (12 Wheat.) 19 (1827) (action for replevin against collector of court-martial fine denied as court-martial had jurisdiction to try a person who refused to obey order calling the militia into service); Wise *v.* Withers, 7 U.S. (3 Cranch) 331 (1806) (action for trespass against collector of court-martial fine allowed as justice of peace exempt from militia duty and therefore not subject to court-martial jurisdiction).

tribunals are not part of the federal judiciary but are agencies of the executive.[33] Lower federal courts entertained habeas corpus petitions and the Court of Claims heard claims for back pay but the Supreme Court limited their inquiry to jurisdiction.[34] By

[33] Kurtz *v.* Moffitt, 115 U.S. 487, 500 (1885) (in holding that the civil criminal courts have no jurisdiction over purely military offenses and possess no power to control or revise court-martial proceedings the Supreme Court relied on the fact that military tribunals were not part of the federal judiciary); Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 251 (1864) (in proclaiming a lack of power to review the findings of a military commission by certiorari a military commission was found not a court within the meaning of the 1789 Judiciary Act). The principal advocate of the view that courts-martial were part of the executive was WINTHROP at 47–64. For a criticism of the Winthrop view see testimony of General Ansell, *Hearings on S. 5320 Before the Senate Comm. on Military Affairs*, 65th Cong. 3rd Sess. 48–52 (1919).

[34] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court on appeal from the circuit court held that a military commission had no jurisdiction over a civilian in Indiana where the civil courts were open. In reaction to this decision and Ex parte McCardle, 6 U.S. (6 Wall.) 50 (1867), Congress enacted the Act of March 27, 1868, ch. 34, 15 Stat. 44, to remove the appellate jurisdiction of the Supreme Court in habeas corpus cases in an effort to remove impediments to Reconstruction Military governments. The act was upheld in Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). However, in McCardle and in Ex parte Yerger, U.S. (8 Wall.) 85 (1869), the Supreme Court construed this Act as only repealing the 1867 Judiciary Act and not as limiting the Court's appellate jurisdiction under the 1789 Judiciary Act and the Constitution. *See* BURGERS, RECONSTRUCTION AND THE CONSTITUTION, 197 (1902); 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 455 (1937 ed.). For a sense of the Supreme Court's treatment of the jurisdiction question in military cases *see* Givens *v.* Zerbst, 255 U.S. 11 (1921) (jurisdiction of court-martial for murder sustained as held within time of war although record of trial did not indicate the accused was in the military); Johnson *v.* Sayre, 158 U.S. 109 (1895) (navy court-martial had jurisdiction over a paymaster); In re Morrisey, 137 U.S. 157 (1890) (court-martial had jurisdiction over a accused even though his parents had not consented to his enlistment; requirement of age for benefit of parents not the minor); In re Grimley, 137 U.S. 147 (1890) (court-martial had jurisdiction over accused despite fact he had procured enlistment by not revealing his over-age-enlistment held a contract which changes one's status and not terminable at will of enlistee); Smith *v.* Whitney, 116 U.S. 167 (1885) (Supreme Court refused to issue writ of prohibition against Sec. of Navy as court-martial had jurisdiction over the defendant, Chief of Bureau of Provisions and Clothing and Paymaster General); Wales *v.* Whitney, 114 U.S. 564 (1885) (Supreme Court dismissed writ since petitioner restricted to limits of Washington, D.C., was not in custody); Keyes *v.* United States, 109 U.S. 336 (1883) (Court of Claims held in error in granting back pay as court-martial had jurisdiction even though the prosecutor was a member of the court and a witness in the case); *Ex parte* Mason, 105 U.S. 696 (1881) (court-martial had jurisdiction over soldier who killed a prisoner while on duty in Washington, D.C., jail as crime held clearly prejudicial to good order and discipline); *Ex parte* Reed, 100 U.S. 13 (1879) (Navy court-martial had jurisdiction over a clerk of paymaster as a "person in naval service of the U.S."). State court practice of hearing military habeas corpus petitions was forbidden in Tarble's Case, 80 U.S. (13 Wall.) 397 (1872).

the turn of the century the scope of review, although still couched in jurisdictional terms, also included whether the court-martial had exceeded its sentencing power [35] and whether the court-martial was properly constituted.[36] Claims of the denial of constitutional due process by courts-martial received little consideration from the federal courts in the nineteenth and early twentieth centuries.[37] Under this scope of review few court-martialed persons obtained relief from federal courts. With the advent of the Second World War some lower federal courts utilized recently broadened guidelines for review of habeas corpus petitions from state courts [38] in reviewing military convic-

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[35] Although purporting to review the legality of sentences, petitioners to the Supreme Court received little relief. Carter *v.* McClaughry, 183 U.S. 365 (1902) (punishment of officer held lawful although it exceeded the maximum punishment prescribed by the President for enlisted men; *Ex parte* Mason, 105 U.S. 696 (1881) (sentence including dishonorable discharge and total forfeitures not additional punishment for an assimilated crime); *Ex parte* Reed, 100 U.S. 13 (1879) (this decision first hinted at power to determine if sentence was void but case not decided on this ground).

[36] Kahn *v.* Anderson, 255 U.S. 1 (1921) (court-martial had jurisdiction although some members of the court were retired and others were officers of the U.S. Guard); United States *v.* Brown, 206 U.S. 240 (1907) (proceedings void and Lt. entitled to back pay where one of required members of court was in the Regular Army and accused was a volunteer); McClaughry *v.* Deming, 186 U.S. 49 (1902) (a volunteer Captain was entitled to writ as court-martial composed of Regular Army officers had no jurisdiction to try accused); Swaim *v.* United States, 165 U.S. 553 (1897) (denial of back pay sustained although general officer was tried by officers inferior in rank); Mullan *v.* United States, 140 U.S. 240 (1891) (court-martial in Hong Kong had jurisdiction even though five of the court members were junior in rank to accused—discretionary decision of commander in appointing junior officers not reviewable); Runkle *v.* United States, 122 U.S. 543 (1887) (Major entitled to back pay where evidence was insufficient to show that President approved his dismissal as required by ARTICLES OF WAR, 1874, art. 69).

[37] When considered, constitutional claims were usually denied. The traditional federal court response followed the dictum of Chief Justice Chase in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138 (1866): "[T]he power of Congress in the government of the land and naval forces . . . is not at all affected by the fifth or any other amendment." Accordingly, the Supreme Court denied claims of infringement of constitutional rights in Swaim *v.* United States, 165 U.S. 553 (1897) (double jeopardy—sentence sent back twice by President for harsher punishment; procedural due process); Johnson *v.* Sayre, 158 U.S. 109 110 (1895) (cruel and unusual punishment); Keyes *v.* United States, 109 U.S. 336 (1883) (due process—court member was prosecutor and witness); *Ex parte* Reed, 100 U.S. 13 (1879) (double jeopardy—sentence sent back for reconsideration); Claims of denial of due process in discharge proceedings were rejected by Supreme Court in Cleary *v.* Weeks, 259 U.S. 336 (1922) (Supreme Court also held it had no jurisdiction to issue writ of mandamus against Secretary of War to vacate discharge); French *v.* Weeks, 259 U.S. 326 (1922); Reeves *v.* Ainsworth, 219 U.S. 296 (1911).

[38] Johnson *v.* Zerbst, 304 U.S. 450 (1938).

tions.[39] However, this closer judicial scrutiny and the occasional success it yielded to a military defendant was short-lived. In a series of decisions concerning World War II military tribunals the Supreme Court reverted to the narrow inquiry of jurisdiction and affirmed the traditional doctrine of non-interference with military judicial proceedings.[40] This practically meaningless fed-

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[39] *E.g.*, United States ex rel. Innes *v.* Hiatt, 141 F. 2d 664, 666 (3rd Cir. 1944) (although deciding adversely to the petitioner on the merits the Third Circuit held that "An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be."); Shapiro *v.* United States, 69 F. Supp. 205 (Ct. Cl. 1947) (court found denials of counsel and due process violation deprived court-martial of jurisdiction; government did not appeal, stipulating judgment in 108 Ct. Cl. 754 (1948). For insight into federal review of World War II courts-martial prior to passage of Uniform Code of Military Justice *see* Antieau, *Courts-Martial and the Constitution*, 33 MARQ. L. REV. 25 (1949) (optimistic and premature expectation of ability of federal courts to correct constitutional defects of courts-martial); Fratcher, *Review by the Civil Courts of Judgements of Federal Military Tribunals*, 10 OHIO ST. L. J. 271 (1949); Palsey, *The Federal Courts Look at the Court-Martial*, 12 U. PITT. L. REV. 7 (1950); Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 MO. L. REV. 147 (1949); Note, *Collateral Attack on Courts-Martial in the Federal Courts*, 57 YALE L. J. 483 (1948).

[40] Hiatt *v.* Brown, 339 U.S. 103 (1950), *rev'g* 175 F. 2d 273 (5th Cir. 1949) (reversed on ground that appointment of non-lawyer law member was within discretion of convening authority; circuit court findings of due process denial in gross incompetence of counsel and law member, no pre-trial investigation, insufficiency of evidence, and misconception of law by reviewing authorities held by Supreme Court as improper since the single test is jurisdiction); Humphrey *v.* Smith, 336 U.S. 695 (1949), *rev'g* Smith *v.* Hiatt, 170 F. 2d 61 (3rd Cir. 1948) (reversed on ground that requirement of fair and impartial pre-trial investigation not indispensable to general court-martial jurisdiction and due process issue not raised absent unfairness at trial; Supreme Court noted that habeas corpus does not permit the review of "guilt or innocence of persons convicted by courts-martial"); Wade *v.* Hunter, 336 U.S. 684 (1949), *aff'g* 169 F. 2d 973 (10th Cir. 1948) (affirming withdrawal of charges from one court after evidence had been taken and the referral to another court as permissible by military necessity of advancing Army and not in violation of protection against double jeopardy) (*But see* dissent of Murphy, J. agreeing with district court and Army Board of Review that double jeopardy guarantee was violated). The Supreme Court also denied review of cases tried before military commissions. *See* Koki Hirota *v.* McArthur, 338 U.S. 197 (1949) (denied motion to file writs as tribunal sentencing Japanese leaders found not a tribunal of the United States but tribunal set up by Gen. McArthur as an Agent of Allied Forces); In re Yamashita, 327 U.S. 1 (1946) (refusal to grant writs of prohibition, certiorari, and habeas corpus to Japanese General tried by military commission in Philippines for war crimes); *Ex parte* Quirin, 317 U.S. 1 (1942) (denied writs of habeas corpus for four German saboteurs tried by military commission in the United States).

eral court review of courts-martial further emphasized the necessity for the reform of military justice.[41]

During and after the Second World War the military establishment recognized the intensity, if not the validity, of the criticism of military justice. The Secretaries of the various services and the Secretary of Defense created numerous committees to investigate complaints, correct injustices, and provide suggestions for improvement in the administration of military justice.[42] Amendments to the Articles of War slipped through Congress in 1948 [43] but only sharpened the issues instead of diminishing the call for reform.[44] Noting the multiple demands on Congress for changes in the Army and Navy systems of justice, Senator Chan Gurney, Chairman of the Senate Armed Services Committee, suggested to the Secretary of Defense in the Spring of 1948 that a study of military justice be conducted with a view toward producing a comprehensive and uniform bill.[45] After discussion with the three services the Secretary of Defense responded fa-

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[41] Since the passage of the Uniform Code of Military Justice in 1950 the Supreme Court partially opened the door for federal court review in Burns *v.* Wilson, 346 U.S. 137 (1953), by sanctioning inquiry into whether the military has "fully and fairly" considered claims of denials of constitutional due process. In addition the Supreme Court has made drastic changes in the personal jurisdiction of courts-martial.

[42] Navy studies included the First Ballantine Report, U.S. Navy (1943); Naval War-Time Discipline Report from U.S. Naval Institute Proceedings, July, August, October 1944 (headed by Vice Admiral Taussig); the Second Ballantine Report, U.S. Navy (1945); Report of the McGuire Comm. to the Secretary of the Navy (1945); Report and Recommendations of the General Court-Martial Sentence Review Board (1947); Report of Colonel James M. Snedeker, USMC, to The Judge Advocate General (1946); the White Report, A Study of Five Hundred Naval Prisoners and Naval Justice (1946). Army efforts included the Board on Officer-Enlisted Men's Relationships headed by General James Doolittle (Doolittle Report, S. Doc. No. 196, 79th Cong., 2d Sess. (1946)); War Department Advisory Board on Clemency Report (1946) (headed by former Supreme Court Justice Owen Roberts); VANDERBILT COMM. REPORT.

[43] Act of June 24, 1948, ch. 625, tit. II, arts. 1–121, 62 Stat. 627 [hereinafter cited as ARTICLES OF WAR, 1948]. The act, known as the Elston Act, was brought to the floor of the Senate as an amendment to the National Defense Act of 1948 and after the erroneous assertion by Senator Kem that the proposed Articles of War were approved by the American Bar Association and the Vanderbilt Committee the Senate narrowly passed the amendment, 44 to 39. 94 CONG. REC. 7517–25 (1949).

[44] For comment and criticism on the Elston Act *see* 34 A.B.A.J. 702 (1948); Farmer and Wells, *Command Control—Or Military Justice?*, 24 N.Y.U. L. REV. 263 (1949); Keefe and Moskin, *Codified Military Injustice*, 35 CORNELL L. Q. 151 (1949).

[45] Letter from Senator Chan Gurney to Secretary of Defense James Forrestal, May 3, 1948, I MORGAN PAPERS.

vorably [46] and formed the Committee on a Uniform Code of Military Justice. Under the able leadership of Professor Edmund M. Morgan of Harvard Law School this committee produced the Uniform Code of Military Justice which was introduced in Congress on February 8, 1949.[47] With relatively minor modifications in Congress the Uniform Code of Military Justice became law under the signature of President Truman on May 5, 1950, and has governed the conduct of servicemen since May 31, 1951.[48]

An important feature in the structure of military justice under the Uniform Code of Military Justice was the creation of the Court of Military Appeals.[49] The establishment of a civilian tribunal of final appeal for courts-martial was unprecedented and an understanding of contemporary military justice is impossible without an examination of the origin, power, operation and potential of the Court of Military Appeals. Before undertaking such an examination of the "Supreme Court of the military" the author would like to state three observations which he believes any reasonable discussion of military justice must recognize:

First, until the passage of the Uniform Code of Military Justice the accepted theory and the acknowledged practice was that defendants before military tribunals were not protected by the Bill of Rights.[50]

Second, the relationship between the military establishment and the government and the citizens of the United States has dramatically changed since the first articles for the government of the land and naval forces were adopted under the Constitution of the United States. The changes in the nature of warfare, the assumption of world leadership in the twentieth century, and the

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[46] Letter from Secretary of Defense James Forrestal to Senator Chan Gurney, May 14, 1948, I MORGAN PAPERS; *see also* letter from Secretary of Defense James Forrestal to Congressman Walter G. Andrews, Chairman of House Armed Services Committee, May 21, 1948, I MORGAN PAPERS.

[47] 95 CONG. REC. 939 (1949) (remarks of Senator Tydings introducing S. 857).

[48] UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–940 (1964), *as amended*, (Supp. IV, 1969) (originally enacted as Act of May 5, 1950, ch. 169, § 1, arts. 1–140, 64 Stat. 107) [hereinafter cited as UCMJ].

[49] UCMJ, art. 67.

[50] Notes 14 and 36, *supra*. For more recent examinations of the historical relationship between courts-martial and the Constitution *see* Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (concludes that the Bill of Rights applied except for the grand jury and petty jury rights); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 166 (1958) (concludes that the Bill of Rights was not intended to apply and did not apply in courts-martial).

development of the military-industrial complex have magnified the importance of the military in our country. Today, almost 28,000,000 Americans have served in the armed forces [51] compared to the 184,000–250,000 men that served in the Revolutionary War.[52] Our authorized military strength in 1971 was over 3,400,000 [53] compared to the authorized volunteer Army of 840 in our first year under the Constitution.[54] Expenditures for national defense are estimated at over 76 billion dollars in the 1972 fiscal year, over 40% of federal expenditures.[55] The influence of the military permeates our society and coupled with the growth of concern for individual rights at criminal proceedings and the expansion of courts-martial subject matter jurisdiction [56] de-

[51] 1969 Administrator of Veterans' Affairs Ann. Rep. 4 (there were 27,647,000 living veterans at the end of fiscal year 1970; veterans and their families comprise approximately 48% of the U.S. population).

[52] STATISTICAL ABSTRACT, table 385, at 256.

[53] *Id.*, table 372, at 255.

[54] AMERICAN STATE PAPERS: MILITARY AFFAIRS. 6 (Lowrie & Clarke ed. 1832).

[55] Special Analysis, Budget of the U.S. Govt. Fiscal Year 1972, Table A–8, at 21 (1971). In addition, this table estimates expenditures for veterans affairs at over 10 billion dollars. The impact of defense spending on the economy and employment in the United States is described in the 1971 ANNUAL ECONOMIC REPORT OF THE PRESIDENT, at 42–49. *See also* R. KAUFMAN, THE WAR PROFITEERS (1970).

[56] The scope of offenses triable by courts-martial has gradually increased since the first Articles of War. The 1806 Articles contained no express provision for the trial of common law felonies. Article 33 of the 1806 Articles of War and Article 59 of the 1874 Articles of War made an offense of the failure of an officer to turn over an offender within his command to the appropriate civil magistrate upon request. In 1863 an amendment to the Articles of War specifically gave courts-martial jurisdiction to try common law felonies during a time of war. Act of March 3, 1863, ch. 75, sec. 30, 12 Stat. 731, 736. Article 58 of the 1874 Articles of War continued this provision. The 1916 revision of the Articles of War made all common law felonies punishable by court-martial except murder and rape committed in the United States during a time of peace. Articles of War, 1916, arts. 92, 93. The UCMJ completed the extension of subject matter jurisdiction making all felonies triable by courts-martial in time of war and peace. However, the Supreme Court in O'Callahan *v.* Parker, 395 U.S. 258 (1969), has limited court-martial jurisdiction to "service connected" offenses. The early Articles of War included provisions forbidding "conduct unbecoming an officer and a gentleman" and "disorders and neglects to the prejudice of good order and discipline in the military." ARTICLES OF WAR, 1806, arts. 83, 99. These provisions were continued in ARTICLES OF WAR, 1874, arts. 61, 60; ARTICLES OF WAR, 1916, arts. 95, 96 (added the phrase "all conduct of a nature to bring discredit upon the military service"); ARTICLES OF WAR, 1920, arts. 95, 96; UCMJ, arts. 133, 134 (considered to assimilate all federal crimes into the military code). The corresponding Navy provision was article 22. Articles for the Government of the Navy, ch. 10, sec. 1624, art. 22, 18 Rev. Stat., pt. 1, at 280 (1874) (later redesignated 22a). While it is undisputed that the "general articles" could not be utilized to punish capital crimes it is uncertain whether other serious crimes committed by servicemen

mands that the traditionally assumed relationship between the Constitution and military tribunals be reexamined.[57]

Third, as the subsequent pages will demonstrate, the passage of the Uniform Code of Military Justice and the subsequent operation of the Court of Military Appeals has significantly altered the relationship between constitutional guarantees and the military defendant.

II. THE ORIGIN OF THE COURT OF MILITARY APPEALS

A. APPELLATE REVIEW IN THE MILITARY PRIOR TO THE UNIFORM CODE OF MILITARY JUSTICE

From the earliest Articles of War the commanding officer who convened a court-martial has been a principal reviewing authority of its findings and sentence.[58] Until expressly forbidden in 1920, the reviewing power of the commander included ordering a reconsideration of a lenient sentence or a not guilty finding.[59] Also until 1920 there was no statutory requirement for review by a legally trained officer for most courts-martial.[60] Special cases

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against civilians were intended to be punished under these articles. Historical evidence indicates that these articles were construed broadly and almost all kinds of criminal misconduct were prosecuted. For insight into the "general articles" *see* DAVIS, at 468–78; Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L. J. 259 (1971); Hagan, *The General Article—Elemental Confusion*, *10* MIL. L. REV. 63 (1960); Nichols, *The Devil's Article*, 22 MIL. L. REV. 111 (1963).

[57] Former Chief Justice of the Supreme Court, Earl Warren, made an evaluation in Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

[58] DAVIS, at 199–217; WINTHROP, at 683–735. For a thorough discussion of appellate review from the early American Articles of War through the 1948 Articles *see* Fratcher. *Appellate Review in American Military Law*, 14 MO. L. REV. 15 (1949).

[59] ARTICLES OF WAR, 1920, arts. 47, 50½. The practice of returning a not guilty finding or a lenient sentence for reconsideration was a focal point of post World War I reaction to military justice. *See Trials by Court-Martial, Hearings Before Senate Comm. on Military Affairs on S. 5320*, 65th Cong., 3d Sess., 34–35, 246–66 (1919); *Establishment of Military Justice, Hearings Before Senate Comm. on Military Affairs on S. 64*, 66th Cong., 1st Sess., 1379–80 (1919). The practice was attacked on constitutional grounds in Bruce, *Double Jeopardy and the Power of Review in Court-Martial Proceedings*, 3 MINN. L. REV. 484 (1919). In response to public and internal pressure the Army discontinued the practice in 1919. General Order No. 88, War Dep't., sec. 1, July 14, 1919. After the express prohibition of reconsideration of disliked findings and sentences, commanders were still able to make their desires known to court members. Note 9, 11, 27, *supra*.

[60] ARTICLES OF WAR, 1920, art. 46, provided "Under such regulation as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or convening authority shall be referred by him, before he acts thereon, to his staff judge advocate or to

involving a general officer, the dismissal of an officer, or a sentence of death traditionally required approval by a higher authority.[61] The Judge Advocate General of the Army often rendered advisory opinions on military law and on cases requiring approval by the President although the official function of the early Judge Advocate General was the custodian of the records of military tribunals.[62] In 1878 The Judge Advocate General was empowered to "receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry and military commissions." [63] A controversy arose during the First World War over the meaning of "revise" but the proponents of an expansive meaning were defeated and The Judge Advocate General continued to act only in an advisory capacity.[64] In 1920 boards of review were established in the Office of The Judge Advocate General to make recommendations in cases involving the approval of the President, a dishonorable discharge, confinement in a federal penitentiary, or any general court-martial found legally insufficient by The Judge Advocate General.[65] However,

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the Judge Advocate General." However, a commander was not required to follow the advice of his staff judge advocate. Special and summary courts-martial continued to receive no legal review. It should be noted that prior to 1920 a convening authority sometimes sought the advice of a judge advocate before acting in a case. The procedure described in Article 46 had become a requirement through Change 5, para 370, Manual for Courts-Martial, 1917, dated 14 July 1919.

[61] ARTICLES OF WAR, 1806, art. 65 (sentence of dismissal of an officer and death were required to be approved by the President during a time of peace; cases involving a general officer in time of war or peace required Presidential approval); ARTICLES OF WAR, 1874, arts. 105, 106, 108 (same requirements as above although during Civil War there were modifications regarding sentences of death); ARTICLES OF WAR, 1916, art. 48 (suspension or dismissal of a cadet added to actions requiring Presidential confirmation).

[62] ARTICLES OF WAR, 1806, art. 90; ARTICLES OF WAR, 1874, art. 113. For history on The Judge Advocate General of the Army, see *Winthrop*, at 262–66; Fratcher, *History of the Judge Advocate General's Corps, United States Army*, 4 MIL. L. REV. 89 (1959).

[63] Act of June 23, 1874, ch. 458, sec. 2, 18 Stat. 244. Under this authority, The Judge Advocate General sometimes made recommendations to convening authorities but these recommendations were strictly advisory and usually only served as future guidance.

[64] Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel Ansell*, 35 MIL. L. REV. 1 (1967); West, *A History of Command Influences on the Military Judicial System*, 18 U.C.L.A. L. REV. 1, 20–41 (1970) [hereinafter cited as West]. *See also 1919 Hearings on S. 5320* and *1919 Hearings on S. 64, supra* note 59.

[65] ARTICLES OF WAR, 1920, arts. 48, 50½ (Presidential approval was required in some cases as provided in 1916 Articles). An insight into the operations of these tribunals may be obtained from Conner, *The Judgmental Review in General Court-Martial Proceedings*, 32 VA. L. REV. 39 (1945); Conner, *Legal Aspects of the Determinative Review of General Court-Martial Cases Under Article of War 50½*, 31 VA. L. REV. 119 (1944); Fratcher,

these boards of review could be overruled by The Judge Advocate General and the Secretary of War. The appellate structure of the Army was complicated in 1948 by the creation of a Judicial Council, a super board of review composed of general officers.[66] Court-martial review in the Navy was also conducted by the commander who had convened the court.[67] As in the Articles of War certain cases required approval by the President.[68] The appellate review system of the World War II Navy was more informal than the Army structure with the Secretary of the Navy possessing broad discretionary powers.[69] By World War II every general court-martial was reviewed for legal sufficiency by the Military Law Division or a board of review in the Office of The Judge Advocate General. The Judge Advocate General reviewed these recommendations and added his opinion for consideration by the Secretary of the Navy. If a conviction was found legally

supra, note 58 at 45–55; King, *The Army Court-Martial System*, 1941 WIS. L. REV. 311, 334–41. *See also*, MCNEIL, HISTORY, BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL WITH THE U.S. FORCES, EUROPEAN THEATER (1946). These boards of review did not possess fact-finding powers but were limited to questions of law and whether there was "substantial evidence" to support the findings. It is noteworthy that when The Judge Advocate General concurred with a board of review opinion favorable to an accused, the record of trial was returned to the reviewing authority for rehearing or other appropriate action. This represented the first lawful exercise of judicial authority over courts-martial by a non-commander, The Judge Advocate General. *See* CM 154185, 29 Dec. 1922.

[66] ARTICLES OF WAR, 1948, arts. 48, 50. The addition of the Judicial Council to the appellate structure created a complex network of interrelationships between the convening authority, boards of review, The Judge Advocate General, the Judicial Council, the Secretary of the Army, and the President. Suffice it to say that the resulting system was a bureaucratic masterpiece. For a brief description of the Judicial Council, *see* Fratcher, *supra*, note 58, at 55–69.

[67] NAVAL ARTICLES, arts. 32, 33 (convening authority empowered to approve, confirm, review, remit, or mitigate summary court-martial proceedings), arts, 53, 54 (convening authority empowered to approve, confirm, revise, remit, or mitigate general court-martial proceedings). This power technically included the right to return a not guilty finding or a lenient sentence for reconsideration but the practice was forbidden without approval of the Secretary of the Navy. NAVAL COURTS AND BOARDS, sec. 477 (1937 ed.)

[68] NAVAL ARTICLES, art. 53 (sentence of death or dismissal of commissioned and warrant officers required Presidential confirmation). During the Second World War the power to dismiss officers was delegated to the Secretary of the Navy. Exec. Order No. 9556, 10 Fed. Reg. 6151 (1945).

[69] "The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps." Act of Feb. 16, 1909, ch. 131, sec. 9, art. 54(b), 35 Stat. 621. For a description of the review procedure for Navy and Marine Corps courts-martial during World War II, *see* Pasley and Larkin, *The Naval Court-Martial: Proposals for its Reform*, 33 CORNELL L. Q. 195, 217–34 (1947).

sufficient the Secretary of the Navy received recommendations on sentences from the Chief of Naval Personnel or the Commandant of the Marine Corps.

Thus, when the committee on a Uniform Code of Military Justice began its work in the summer of 1948, review of courts-martial was essentially dominated by military commanders.[70] Review by the person convening the court reflected the doctrine that courts-martial were primarily instruments of command for the maintenance of good order and discipline. The rendering of justice and consideration of individual rights were secondary to the necessity for discipline. It was also considered imperative that the commander possess punitive control over his men inasmuch as the commander was supposedly responsible for the actions of his men.[71]

B. *THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE AND APPELLATE REVIEW*

Secretary of Defense Forrestal outlined a threefold objective for the Committee on the Uniform Code of Military Justice:

> First, it should integrate the military justice system of the three services. To this end, provisions of the code should apply to the three services on as uniform a basis as possible.
>
> Second, modernization of the existing systems should be undertaken with a view to protecting the rights of those subject to the code and increasing public confidence in military justice, without impairing the performance of military functions.
>
> Third, the new code should represent an improvement in the arrangement and draftsmanship of the resultant articles, as compared with present Articles of War and Articles for the Government of the Navy.[72]

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[70] The Air Force, which became an independent service in 1947, was governed by the 1920 Articles of War when the committee on a Uniform Code of Military Justice began its work. Act of July 26, 1947, ch. 343, tit. 2, secs. 207–8, 61 Stat. 495.

[71] The theory of command responsibility was espoused by Chief Justice Stone in refusing to hear the petitions of a Japanese General convicted by a military commission of war crimes in the Philippines. In re Yamashita, 327 U.S. 1, 13–17 (1946). The My Lai tragedy and the trial of Lt. Calley has again brought the issues of war crimes and the responsibility of commanders to the public forum.

[72] Letter from James Forrestal to the Committee on a Uniform Code of Military Justice, August 18, 1948, I MORGAN PAPERS. The Committee on a Uniform Code of Military Justice was composed of Professor Edmund M. Morgan, Harvard Law School; Gordon Gray, Ass't. Secretary of the Army; John M. Kennedy, Under Secretary of the Navy; Eugene M. Zuckert, Ass't. Secretary of the Air Force. Felix E. Larkin, Ass't. General Counsel for the Secretary of Defense, served as Executive Secretary for the Code Committee.

The Code Committee partially met these objectives by proposing the creation of a civilian tribunal of final appeal for courts-martial. In tracing the creation of the Court of Military Appeals it is helpful to keep in mind the objectives of uniformity, protection of individual rights, and increased public confidence.

1. Previous Proposals for Appellate Review.

The concept of a wholly civilian tribunal to review courts-martial was not new. It was proposed by General Samuel T. Ansell after the First World War as part of unprecedented and still unmatched assault on the structure of military justice.[73] General Ansell proposed the removal of the commander from the reviewing process and urged the establishment of a strong appellate court. General Ansell was moved by numerous courts-martial tainted by abuses of command discretion, the lack of legally trained personnel in the court-martial process, and inordinately heavy sentences.[74]

The Fort Sam Houston mutiny trials vividly manifested the deficiencies in World War I military justice.[75] Subjected to segregationist policies in housing and duty assignment, a company of Negro soldiers seized some arms. A racial fight ensued which resulted in death and injury to several civilians and servicemen. Sixty-three Negro soldiers were court-martialed; fifty-five were convicted; and thirteen were sentenced to death. The convening authority quickly approved the findings of the courts-martial and ordered the sentences executed. Testifying before a congressional committee, General Ansell said of these trials: "The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I see, any one of them having had time or opportunity to seek clemency from the source of clemency, if he had been so advised." [76] To satisfy the obvious need for an appellate structure in the administration of military justice General Ansell proposed the creation of a

[73] S. 64, 66th Cong., 1st Sess. (1919) (introduced by Senator Chamberlain) (introduced in the House by Congressman Royal Johnson as H.R. 367, 66th Cong., 1st Sess. (1919)). For comments and criticism of General Ansell's bill *see* notes 12, 64 *supra*.

[74] For examples of World War I courts-martial *see* 1919 Hearings on S. 5320, *supra* note 59, at 9–22 (testimony of General Ansell); WEST, at 22–29. Professor Morgan who served as a chairman of a clemency committee in the Office of the Judge Advocate General during World War I remarked in 1949 congressional hearings that his committee had cut 18,000 years of sentences in six weeks. 1949 HEARINGS at 311.

[75] 1919 Hearings on S. 5320, *supra* note 59, at 39–42.

[76] *Id.* at 39.

Court of Military Appeals.[77] The Court was to be composed of three judges, presumably civilian,[78] appointed for life by the President with the advice and consent of the Senate. The judges were to receive the compensation and retirement benefits of a circuit judge of the United States. Ansell's Court of Military Appeals was to be located, for the purposes of administration only, in the Office of The Judge Advocate General. The Court was to review every general court-martial in which the sentence included death, dismissal or discharge, or confinement for more than six months. The appeal was to be of right exercisable by an accused in open court after the announcement of sentence. The Court was to correct errors of law which appeared on the record whether or not such errors were objected to at trial. Ansell's appellate tribunal was also to be empowered to disapprove all or part of a sentence and to disapprove a finding of guilty or, if appropriate, to approve a lesser included offense. The decisions of the Court of Military Appeals were to be followed by the convening authority including the ordering of a new trial. In those cases that the President was to take action the Court of Military Appeals could make recommendations of clemency.

Other officers from the Office of The Judge Advocate General supported General Ansell in his fight for the reform of military justice.[79] Unfortunately, the recommendations of General Ansell,

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[77] S. 64, 66th Cong., 1st Sess., art. 52 (1919), printed in Senate Comm. on Military Affairs, 66th Cong. 1st Sess., Army Articles: Comparative Print Showing the Bill (S. 64) to Establish Military Justice 24–26 (Comm. Print 1919). General Ansell's adversary, General Enoch Crowder, the Judge Advocate General, vigorously opposed the creation of a Court of Military Appeals:

> The idea of a civil court of military appeals is wholly untenable from my point of view. And, so, too, is the idea of an exclusively military court of appeals functioning independently of the president . . . . I think it would affect in the most detrimental way the fighting efficiency of our forces . . . . I can conceive of this appellate jurisdiction as you have outlined it, but it gives me pause when I reflect upon the fact that what you propose is a completely new experiment which no great nation will ever attempt—except Russia . . . . It is unreasonable to assume that any but military men could judge of the weight or relevancy of the evidence in determining the conduct of a man on the field of battle where the evidence is strategical or tactical and wholly military.

1919 Hearings on S. 64, *supra* note 59, at 1263, 66, 67.

[78] Ansell's article 52 did not explicitly provide for judges appointed from civilian life although from congressional testimony it is reasonably certain that the judges of the Court of Military Appeals were intended to be civilian.

[79] Lt. Col. Edmund Morgan, future chairman of the Committee on the Uniform Code of Military Justice, supported General Ansell's effort to create a Court of Military Appeals. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L. J. 52, 71–74 (1919).

opposed by the Department of War, perished in congressional committee.[80]

In searching for an appellate review structure that would be acceptable to all services the Code Committee sought ideas from numerous individuals and organizations.[81] Professor Morgan, Chairman of the Code Committee, had received a copy of a plan previously submitted to then Secretary of Navy Forrestal that called for a permanent Supreme Court-Martial composed of nine judges appointed from the military to serve during good behavior until the termination of their active service with an appeal in certain cases to a United States Court of Appeals.[82] A civilian board responsible only to the Secretary of Defense was suggested to the Code Committee.[83] An Armed Forces Supreme Court with judges appointed in the same manner as federal judges was also proposed.[84] The author of this proposal observed that "this lack of 'effective appellate review' is one of the main contributing causes of the widespread ill-will that exists throughout our country, not only against our army court-martial system but against all *army officers* as well as the Army as a whole." [85]

The Code Committee was naturally assisted in its quest for a satisfactory review arrangement by the voluminous reports of

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[80] The subcommittee considering S. 64 did not report it but instead reported revised articles which became the 1920 Articles of War. *See* Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 14 (1967).

[81] Form letter from Edmund M. Morgan to certain individuals and organizations, September 16, 1948, III MORGAN PAPERS.

[82] Letter from Robert L. Dressler to Edmund M. Morgan, September 18, 1948, IV MORGAN PAPERS. Senator Pat McCarran had previously submitted a bill to allow anyone convicted by a general court-martial and sentenced to more than one year confinement to appeal, within one year after final approval of his conviction, to the Circuit Court of Appeals in the circuit in which he was incarcerated. The bill also provided for appointment of counsel for minors and certiorari to the Supreme Court. S. 1160, 80th Cong., 1st Sess. (1947). The bill was never acted upon by the Senate Judiciary Committee.

[83] Letter from John J. Finn to Edmund M. Morgan, September 1, 1948, VI MORGAN PAPERS. Congressmen Boren and Knutson had earlier proposed the creation of a 5 judge civilian court to examine the record and hear "any additional evidence" on every general court-martial rendered during World War II. This was to be a temporary court completing its work by 1951 but it also never proceeded beyond Committee. H.R. 5675 and H.R. 6612, 79th Cong., 2d. Sess. (1946).

[84] Letter from Charles M. Dickson to Senator Tom Connally, January 31, 1948 (copy), VI MORGAN PAPERS (letter was in reference to the Elston Act then pending in Congress which became the 1948 ARTICLES OF WAR; the author condemned the proposed military Judicial Council as perpetuating existing inefficiency).

[85] *Id.*

previous committees and congressional hearings. The War Department Advisory Committee had recommended the formation of an Advisory Council and the divorcing of command responsibility from the administration of courts-martial.[86] General courts-martial, at least, were to be administered by The Judge Advocate General and his representatives and The Judge Advocate General was to be the final reviewing authority on findings of fact and issues of law. The Secretary of War rejected these proposals and supported instead the creation of the previously mentioned Judicial Council.[87] Navy reports urged the creation of various boards with a combined civilian and military membership. The McGuire Committee [88] and the Second Ballantine Report [89] recommended the establishment of boards of review with one civilian and two military members. The Keefe Report suggested a sentence review board and a board of legal review of combined military and civilian membership.[90] More radical were the proposals by the Keefe Report for an Office of Chief Defense Counsel to appeal jurisdictional and constitutional decisions of the board of legal review to the Supreme Court of the United States for a willing military defendant [91] and a civilian Advisory Council in the Office of the Secretary of Navy to study continuously the administration of courts-martial.[92]

2. Development of Appellate Review in the Code Committee.

In a memorandum to the Code Committee, Mr. Larkin stated that the Working Group on the Uniform Code was having difficulty in finding a satisfactory appellate review scheme.[93] During their meetings from September 30 to October 1, 1948, the Code Committee was briefed on the existing appellate review proce-

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[86] VANDERBILT COMM. REPORT, at 3, 14–15.

[87] War Dep't. Press Release (February 20, 1947). *See also* notes 8, 43 *supra*.

[88] Report of the McGuire Comm. to the Secretary of the Navy, art. 6 (1945).

[89] The Second Ballantine Report, U.S. Navy, Recommendation C, 6 (1945).

[90] Keefe Report, *supra* note 42, sec. VII, 222–33. For a further explanation of the Keefe Report *see* Keefe, *Universal Military Training With or Without Reform of Courts-Martial*, 33 CORNELL L.Q. 465 (1948).

[91] Keefe Report *supra* note 42, at 254.

[92] *Id.*, 2–5.

[93] Memorandum to Committee on a Uniform Code of Military Justice from Felix E. Larkin, September 25, 1948 I MORGAN PAPERS [hereinafter cited as MEMORANDUM TO CODE COMM.]. The Working Group was a committee of 8 military officers who were largely responsible for drafting provisions of the UCMJ for consideration by the Code Committee. The group was chaired by Mr. Larkin.

dures.[94] Shortly thereafter Professor Morgan proposed to the Code Committee the creation of a civilian Judicial Council to be located in the Office of the Secretary of Defense.[95] There were to be not less than three members nominated by the Secretary of Defense and appointed by the President, with life tenure desirable. In Morgan's proposal the members were to receive the pay of a U.S. circuit judge and to be civilians having at least ten years of legal experience. The Judicial Council was to have appellate jurisdiction over all cases from all services involving a general or flag officer, a death sentence, dismissal or discharge from the service, and all cases certified to it by a Judge Advocate General or on petition from an accused. Professor Morgan suggested that the Judicial Council be empowered to weigh evidence, judge the credibility of witnesses and determine issues of fact. Provision was also made for the appointment of additional members during an emergency. Professor Morgan's scheme did not alter the relationship of the commanding officer to courts-martial and also retained the military boards of review as intermediate appellate tribunals. However, even this diluted version of Ansell's Court of Military Appeals met opposition from the military.[96] The Army was generally satisfied with its recently acquired military Judicial Council. The Air Force was initially opposed to the Morgan plan for appellate review but was equally unsure about the Army model. The Navy opposed the Judicial Council arrangement of the Army and was initially undecided about the Morgan Plan.[97] The Morgan proposal was considered at the Code Committee meeting of October 13–14, 1948, and was tentatively adopted with the following modifications:

1. A Judge Advocate General may send a case back to a Board of Review if it disagreed with a decision;

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[94] Minutes of Meeting of Committee on a Uniform Code of Military Justice, September 30 and October 1, 1948, I MORGAN PAPERS [hereinafter cited as MINUTES OF CODE COMM.].

[95] Proposed Appellate Review System submitted to members of Committee on a Uniform Code of Military Justice by Professor Edmund M. Morgan, I MORGAN PAPERS.

[96] MEMORANDUM TO CODE COMM., October 11, 1948, I MORGAN PAPERS.

[97] After evaluating the various reports on Navy military justice the Secretary of Navy submitted a bill to Congress in the spring of 1942 to amend the Articles for the Government of the Navy. The amendments included the elimination of the commander who convened a court from any reviewing function except the power to grant clemency. The bill would have codified and streamlined existing appellate procedures and granted additional powers to the Judge Advocate General. Membership on the proposed clemency board and board of appeals did not appear to exclude civilians. The bill, however, was not acted upon by Congress. S. 1338, H.R. 3687, 80th Cong., 1st Sess. sec. 39, art. 39 (1947).

2. The Judicial Council should be composed of not less than three civilians, one-third appointed by each of the Secretaries to serve at the will of the Secretary;

3. The Judicial Council was to be limited to review for legal sufficiency;

4. Cases involving a general or flag officer were to go from the Judicial Council to the Secretary of the Department concerned for a sentence recommendation for the President;

5. The Secretaries were to retain residual clemency powers.[98]

These modifications of the Morgan proposal evidenced the unwillingness of the services to surrender control over the administration of military justice. At the next meeting of the Code Committee Mr. Gordon Gray, speaking for the Department of Army and himself, registered strong opposition to the modified Morgan plan.[99] Mr. Gray claimed that the National Security Act required that the three services maintain separate administration of courts-martial and that the establishment of a Judicial Council to hear cases from all the services would violate this principle. Objection to the Judicial Council was also registered because it would deprive the Secretary of the Army and the Judge Advocate General of some judicial authority giving such authority to a tribunal composed of persons without military experience and without a responsibility for the consequences of their decisions. Mr. Gray further opined that the Judicial Council would require a large staff and would create a bottleneck in the administration of a justice system that required speed and finality. However, the other members of the Code Committee maintained their preference for the modified Morgan Plan.[100] Later that fall, Mr. Kennedy, Under Secretary of the Navy, reported that the Coast Guard subscribed to the Navy position on the proposed Judicial Council.[101] In accordance with the desires of the Code Committee at the October meetings the Working Group formulated a draft article of the Judicial Council:

Article 57. Review by the Judicial Council

(a) There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than 3 members. One-third shall be appointed by the Secretary of the Army, one-third by the Secretary of the Navy, and one-third by the Secretary of the Air Force. Each member shall be appointed from civilian life and shall be a member of the bar admitted to practice before the Supreme Court of the

[98] MINUTES OF CODE COMM., October 13, 14, 1948, I MORGAN PAPERS.
[99] MINUTES OF CODE COMM., October 28, 29, 1948, I MORGAN PAPERS.
[100] *Id.*
[101] MINUTES OF CODE COMM., November 11, 12, 1948, I MORGAN PAPERS.

United States, and each member shall receive compensation at the rate of $15,000 per year.

(b) The Judical Council shall review the record in the following types of cases:

(1) All cases in which the sentence, as affirmed by the board of review affects a general officer or extends to death;

(2) All cases which the Judge Advocate General orders forwarded to the Judicial Council for review; and,

(3) All cases in which, upon petition of the accused and on good cuase shown, the Judicial Council has granted a review.

(c) The accused shall have 30 days from the time he is notified of a decision of the board of review to petition the Judicial Council for a grant of review. The Judicial Council shall act upon, such a petition within 15 days of the receipt of thereof.

(d) In any case reviewed by it, the Judicial Council shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which The Judge Advocate General orders forwarded to the Judicial Council, such action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Judicial Council shall take action only with respect to matters of law.

(e) If the Judicial Council sets aside the findings and sentence it may except where the setting aside is based on lack of sufficient evidence to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing it shall order that the chrges be dismissed.

(f) After it has acted on a case, the Judicial Council may direct the Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the Judicial Council. Otherwise, unless there is to be further action by the President, The Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Judicial Council has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charge.[102]

At the December 9, 1948, meeting Mr. Kennedy proposed that regular and retired officers also be eligible for the Judicial Council but he withdrew his suggestion the next day.[103] On December 10, 1948, the above draft article establishing the Judicial Council was approved by the Committee with Mr. Gray dissenting.[104]

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[102] Draft on Judicial Council prepared by Working Group on November 26, 1948, I MORGAN PAPERS.

[103] MINUTES OF CODE COMM., December 9, 10, 1948, I MORGAN PAPERS.

[104] *Id.* Mr. Gray had previously submitted to the Code Committee a statement outlining his opposition to the Judicial Council focusing on the preservation of service integrity. To meet Secretary Forrestal's objective of uniformity Mr. Gray proposed an Advisory Council composed of the Judge Advocate General and a representative of the Secretary of Defense to make

Although the Code Committee had apparently agreed on a system of appellate review, the Judicial Council underwent further revision before being submitted to Congress. Because of the disagreement within the Code Committee over certain concepts, including appellate review, Mr. Larkin invited the Secretary of Defense to meet with the committee.[105] Mr. Forrestal apparently sided with the proponents of the Judicial Council.[106] A tentative draft of the entire Uniform Code of Military Justice was considered and approved by the Code Committee on January 13, 1949.[107] The article establishing the Judicial Council was identical to the draft approved on December 10, 1948, except for the number of the article, 67 instead of 57, and an additional paragraph:

> (g) The Judicial Council and the Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this Code and report to the Secretary of Defense and Secretaries of the Departments any recommendations relating to uniformity of sentence policies, amendments to the Code, and any other matters deemed appropriate.[108]

In addition, Articles 68(b) of this draft provided for the establishment of one or more temporary Judicial Councils in periods of emergency.[109] However, the bill forwarded to Congress on February 8, 1949, contained one major change from the Code approved by the full committee. At the urging of the Bureau of the Budget, with whom Mr. Larkin had cleared the bill to conform with Presidential policies, the President was to appoint the members of the Judicial Council.[110] The Code Committee had previously provided for appointment to the Judicial Council by the

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studies and recommendations on the administration of military justice. Boards of Review of three civilians and three military officers for each service were also put forward. Statement of Mr. Gray Concerning Appellate Review, December 4, 1948, I MORGAN PAPERS.

[105] Memorandum to James Forrestal from Felix E. Larkin, January 5, 1949, IV MORGAN PAPERS (the major areas of disagreement were appellate review, enlisted men on courts-martial, the role of the law officer, effect of refusal of non-judicial punishment).

[106] Letter to Edmund M. Morgan from Secretary of Defense James Forrestal, February 7, 1949, III MORGAN PAPERS (letter accompanied submission of Uniform Code of Military Justice to the Secretary of Defense).

[107] MINUTES OF CODE COMM., January 13, 1949, I MORGAN PAPERS.

[108] MEMORANDUM TO CODE COMM., January 10, 1949, I MORGAN PAPERS (semi-final text of UCMJ prepared by Working Group).

[109] *Id.*

[110] Memorandum to James Forrestal from Felix E. Larkin, January 5, 1949, IV MORGAN PAPERS. *See also Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 610 (1949) (testimony of Edmund M. Morgan) [hereinafter cited as 1949 HOUSE HEARINGS ON H.R. 2498].

Secretaries of the various services.[111] The Judicial Council proposal to the Congress was, in effect, a compromise tribunal. Secretary Forrestal's objective of uniformity was met by the Judicial Council and in combination with other provisions of the proposed Uniform Code of Military Justice the Judicial Council offered potential protection for the military accused.[112] However, while a civilian tribunal of final appeal could be expected to increase public confidence in military justice and win favor in Congress the court-martial review procedure adopted by the Code Committee retained a heavy command flavor with the continued participation of the convening authority.[113]

C. *LEGISLATIVE HISTORY OF THE COURT OF MILITARY APPEALS*

1. *House of Representatives: The Judicial Council Becomes a Court.*

The House Hearings on the Uniform Code of Military Justice began on March 7, 1949, and the subject of appellate review was

[111] Note 98 *supra.*

[112] The injection of legally trained personnel into the administration of military justice held promise for the elimination of "drumhead justice." UCMJ, art. 6 (judge advocates and legal officers partially separated from the command structure); art. 26 (legally trained law officer to perform certain judicial functions in general courts-martial); art. 27 (legally qualified defense counsel required at general court-martial and at special court-martial when trial counsel a lawyer); art. 32 (counsel available at pre-trial investigation); art. 34 (convening authority required to seek advice of staff judge advocate before referring a case to a general court-martial); art. 61 (convening authority shall seek advice of staff judge advocate before taking final action in a general court-martial); art. 65 (record of trial in general court-martial and special court-martial in which a bad conduct discharge was approved must be sent to the Judge Advocate General for final approval; all other courts-martial records of trial shall be reviewed by a legal officer); art. 66 (cases involving certain punishments may be reviewed by a board of review). While the influence of General Ansell was not highly visible in the formulation of the UCMJ, Professor Morgan was undoubtedly influenced by General Ansell. *See* Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 196 (1953); Letter (sent at the request of Professor Morgan with a copy of the proposed UCMJ) to General Samuel T. Ansell from Felix E. Larkin, February 8, 1949, IV MORGAN PAPERS.

[113] UCMJ, art. 59 (power of convening authority to approve a lesser included offense); art. 60 (power of convening authority or successor in command to take action in a case); art. 62 (power to order a reconsideration of a motion granted that did not amount to a finding of not guilty; power to return a record of trial for correction of error or inconsistent action if not materially prejudicial to the substantial rights of accused; record cannot be returned for reconsideration of not guilty finding or to increase punishment); art. 63 (power to order a rehearing of disapproved findings and sentence except where a lack of sufficient evidence; cannot rehear a finding of not guilty or lenient sentence); art. 64 (power to approve all or part of findings and sentence).

to receive considerable attention along with the controversy over command control of courts-martial. Before the hearings began, the House Armed Services Committee had raised questions concerning the proposed Judicial Council.[114] Most of the over 35 witnesses that appeared before the subcommittee and most of the statements and documents received by the subcommittee commented on the need for improved review of courts-martial. In introducing the Uniform Code of Military Justice Professor Morgan strongly supported the establishment of the civilian appellate tribunal. In fact, his testimony called for a stronger body than had been proposed by the Code Committee: "It is apparent that such a tribunal is necessary to insure uniformity of interpretation and administration throughout the armed forces. Moreover, it is consistent with the principle of civilian control of the armed forces that a court of final appeal on the law should be composed of civilians." [115] In response to an inquiry about the term of the service for members of the Judicial Council Professor Morgan stated, "I think the opinion of the committee would have been, because we canvassed this—and certainly it is my opinion—that these men should be appointed in exactly the same way that the circuit court of appeals judges are appointed." [116] As certain as this was the opinion of the chairman of the Code Committee, it certainly did not reflect the view of Mr. Gray and probably overstated the opinions of the other committee members.[117] Criticism and comment on every section of Article 67 followed the introductory remarks of Professor Morgan. The subcommittee was urged to change the name of the tribunal to "Military Court of Appeals," [118] to abolish the requirement of admission to the bar of the Supreme Court,[119] to provide the judges with life tenure,[120]

[114] Letter from Robert Smart, professional staff member of House Armed Services Committee, to Felix E. Larkin, March 1, 1949, VII MORGAN PAPERS. The Committee inquiry included: why did the military Judicial Council under the 1948 Articles of War have the authority to weigh evidence, judge credibility of witnesses, and make determinations of fact while the proposed civilian Judicial Council was not given those powers; what were the intended terms for the members of the Judicial Council; is military experience necessary or desirable for a Council member; what was the anticipated caseload; how many officers would the Council replace; was the feasibility of review to federal circuit courts considered?

[115] 1949 HOUSE HEARINGS ON H.R. 2498, at 604 (testimony of Professor Edmund M. Morgan).

[116] *Id.*, at 610.

[117] Notes 98, 99, 104 *supra*.

[118] 1949 HOUSE HEARINGS ON H.R. 2498, at 673 (testimony of General Franklin Riter on behalf of the American Legion).

[119] *Id.*, at 631 (testimony of Congressman Doyle), 695 (testimony of John J. Finn on behalf of the American Legion).

[120] *Id.*, at 610 (testimony of Professor Morgan), 642 (testimony of Richard

and to permit the Judicial Council to review facts and weigh evidence.[121] It was argued that general and flag officers should not enjoy automatic review unless all accused had that right and the limitation on the time for appeal was attacked.[122] The Judicial Council was seen as raising public confidence in military justice and, if given enough power, almost eliminating the need for courts-martial reform.[123]

There was, however, some opposition to the civilian appellate tribunal. The House Subcommittee was warned that the Judicial Council would cause delay in the administration of military justice and thereby endanger the security of the nation.[124] Col. Wiener, a respected authority on military law, testified in the spirit of General Crowder [125] that civilian review of courts-martial would interfere with the performance of the military.[126]

The House Subcommittee was in agreement with the proponents of a civilian appellate tribunal of final appeal and acted to strengthen Article 67. The judges of the new tribunal were granted tenure on good behavior.[127] The name of the tribunal was changed:

> Mr. Smart. Well, of course, I don't think that the committee should adopt the term 'Judicial Council' purely because we had it in H. R. 2575. . . . Now here you are creating a court equally applicable, for purposes of review, to all of the services. They are civilians, not officers. I think you should adopt some judicial terminology and get away from this 'Council' which suggests to me one of the usual basement operations here in Washington.
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> . . . . . .

Wels, New York County Lawyers Association), 695 (testimony of John J. Finn).

[121] *Id.*, at 689 (testimony of John J. Finn), 725 (testimony of George A. Spiegelberg, Chairman ABA Committee on Military Justice).

[122] *Id.*, at 758 (testimony of Col. John P. Oliver, Legislative Counsel of Reserve Officers Association of U.S.).

[123] *Id.*, at 686 (testimony of John J. Finn).

[124] *Id.*, at 772–73 (testimony of Major General Raymond H. Fleming on behalf of National Guard Bureau).

[125] Note 77, *supra.*

[126] 1949 HOUSE HEARINGS ON H.R. 2498, at 778–806 (testimony of Col. Frederick Bernays Wiener). Col. Weiner presented the orthodox view of military law as an instrument of discipline. He viewed the proposed Judicial Council as unnecessary and was skeptical over the creation of a *civilian* tribunal. After the UCMJ was enacted, Col. Wiener labelled the Court of Military Appeals as one of the four most doubtful changes "as to which all concerned, in the service and out, will have to hold their breaths. Given qualified personnel with vision and breadth of understanding it *might* work." F. WIENER, THE UNIFORM CODE OF MILITARY JUSTICE 24 (1950).

[127] *Id.*, at 1272.

> Mr. Elston. How about 'Supreme Court of Military Appeals,' or 'Court of Military Appeals'? . . . But we ought to have something different than 'Judicial Council!' That sounds too much like a city council.
>
> Mr. Larkin. It sounds like a round table, instead of a court.
>
> . . . . . .
>
> Mr. Elston. I would suggest, Mr. Chairman, to bring the issue to a vote, that we make it 'The Court of Military Appeals.' [128]

The meaning of the phrase "from civil life" was discussed and concern was expressed about the caseload, particularly during a war, but the bill was not amended to reflect these considerations.[129] The Subcommittee submitted a revised bill to the House from which Article 68(b) providing for emergency Judicial Councils was deleted and in which Article 67(g) was amended to include the Armed Services Committees as recipients of the Annual Report of the Court of Military Appeals.[130] The full Armed Services Committee quickly reported the Uniform Code of Military Justice without modification of the Court of Military Appeals although the concept of a political party limitation for the judges was embraced in its report.[131] On the floor of the House the only challenge to the new appellate tribunal was an inquiry as to whether a member of the Court was to be a former enlisted man.[132] The House version of the Uniform Code of Military Justice easily passed on May 5, 1949.[133]

2. *The Senate: The Court of Military Appeals Revised.*

Senate Hearings on the original and House-revised Uniform Code of Military Justice began on April 27, 1949. The Senate Armed Services Subcommittee heard from many of the witnesses that appeared before the House Committee and thus, the issues of command control and appellate review again permeated the sessions. Opposition to the proposed Court of Military Appeals was somewhat stronger in the Senate Hearings. Colonel Wiener reiterated the claims of delay and interference with the maintenance of discipline.[134] The Judge Advocate General of the Army stated that the Court of Military Appeals should be composed of military members because of the specialized nature of

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[128] *Id.*, at 1276.
[129] *Id.*, at 1274–75.
[130] H.R. 4080, 81st Cong., 1st Sess., arts. 67, 68 (1949). For an explanation of the changes *See* H.R. REP. NO. 491, 81st Cong. 1st Sess. 6 (1949).
[131] H.R. REP. No. 491, 81st Cong., 1st Sess. 9 (1949).
[132] 95 CONG. REC. 5728 (1949) (inquiry of Congressman Gross).
[133] *Id.*, at 5744.
[134] 1949 HEARINGS at 128–40 (testimony of Colonel Wiener).

military law.[135] The Judge Advocate General of the Air Force testified in favor of a combined military and civilian tribunal.[136] The President of the Judge Advocate Association, Colonel William J. Hughes, Jr., opined that a civilian court at the head of military justice would be a psychological impediment to the successful disciplining of soldiers.[137] Colonel Hughes introduced the results of a questionnaire sent to the 2,200 members of his association which was overwhelmingly against the creation of the proposed civilian court of final appeal.[138] A majority of the New York State Bar Committee on Military Justice also opposed the Court of Military Appeals.[139] However, the supporters of the Court of Military Appeals found the sympathetic ear of the Senators on the Subcommittee. Professor Morgan emphasized the need for a civilian tribunal and championed treatment as circuit court judges for the future judges of the Court of Military Appeals.[140] The Judge Advocate General of the Navy thought the proposed appellate tribunal would be workable.[141] Other advocates for the the Court of Military Appeals were the War Veterans Bar Association,[142] the American Veterans Committee,[143] the American Legion,[144] and the Bar Association of New York City.[145] Although the Senate Subcommittee was committed to a civilian tribunal

[135] *Id.*, at 259–65, 272–73 (testimony and proposed amendments of Major General Thomas H. Green; he proposed a Military Court of Appeals composed of the Judge Advocates General).

[136] *Id.*, at 289 (testimony of Major General R.C. Harmon).

[137] *Id.*, at 224 (testimony of William J. Hughes, Jr.).

[138] *Id.*, at 226–40. The former officers with military legal experience responded 563 to 67 against an all civilian court appointed by the President at will; 504 to 93 against making Judicial Council the final arbiter on questions of law and boards of review the final authority on sentences (question framed to intimate there would be civilians depriving the Judge Advocate General of existing power). The majority of comments on Article 67 were critical, ranging from civilian inability to understand military law and necessity, to warnings of delay and breakdown in war, and fear of political appointees. Some members favored broader powers for the civilian appellate tribunal.

[139] *Id.*, at 300 (statement of Knowlton Durham, chairman of special committee on the administration of military justice for the New York State Bar Association).

[140] *Id.*, at 37–52 (testimony of Professor Morgan).

[141] *Id.*, at 287 (testimony of George L. Russell, Judge Advocate General of the Navy).

[142] *Id.*, at 91–92 (testimony of Arthur E. Farmer chairman of committee on military law for the War Veterans Bar Association).

[143] *Id.*, at 141–43 (statement and testimony of Joseph A. Clorety, Jr., Vice-Chairman, American Veterans Committee).

[144] *Id.*, at 187–88, 195, 199 (statements of General Franklin Riter and John J. Finn on behalf of the American Legion).

[145] *Id.*, at 207–08 (statement of Richard H. Wels, chairman, special committee on military justice for New York County Lawyers' Association).

of final review, the Senators displayed concern that the court would become a resting place for political appointments.[146] The Senators sought to attract qualified judges by fixing compensation equal to circuit court judges. However, the subcommittee removed House conferred prestige by reducing the term of service to 8 years, providing for removal by the President for cause, and granting the retirement benefits of judges of the territorial courts.[147]

The Court of Military Appeals encountered further resistance on the floor of the Senate. Sweeping amendments to the Uniform Code of Military Justice were offered by Senator Tobey including the replacement of the Court of Military Appeals.[148] The anticipated caseload of the proposed Court was questioned by Senator Kem.[149] Senator McCarran, Chairman of the Senate Judiciary Committee, sparked a controversy about the new court and the entire Uniform Code of Military Justice by moving that the Judiciary Committee be allowed to consider the legislation.[150] In a letter to the Senate Armed Services Committee, Senator McCarran had previously stated that the proposed civilian tribunal was "nothing more than an agency of the executive" and had expressed concern that the tribunal would block civilian court review of courts-martial.[151] After assurances by Senator Saltonstall that the federal courts would not be deprived of their habeas corpus power, the Senate rejected the motion to refer the bill to the Judiciary Committee.[152] An attempt by Senator Morse to restore the House version of the Court of Military Appeals making the tribunal a "court of the United States" was unsuccessful.[153] The Uniform Code of Military Jus-

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[146] *Id.*, at 311–15.

[147] S. REP. NO. 486, 81st Cong., 1st Sess. 28 (1949).

[148] 96 CONG. REC. 1293 (1950) (these amendments were designed to implement the thoughts and desires of the Department of the Army).

[149] *Id.*, at 1363 (1950).

[150] *Id.*, at 1412 (1950).

[151] Letter from Senator Patrick McCarran, Chairman of Committee on the Judiciary, to Senator Millard E. Tydings, Chairman of Committee on Armed Services, April 30, 1949, 1949 HEARINGS at 102, 113–19. Senator McCarran was troubled by Article 76 of the UCMJ which provided that the finally approved finding and sentences of courts-martial "shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States. . . ."

[152] 96 CONG. REC. 1414, 1417 (1950) (the vote was 43 to 33 against the motion).

[153] *Id.*, at 1442–43.

tice was passed without amendment and forwarded to the Conference Committee on February 3, 1950.[154]

3. *The Establishment of the Court of Military Appeals.*

The Conference Committee changed the term of years from 8 to 15 for the future judges of the Court of Military Appeals, provided for the staggering of terms, and granted the prospective judges civil service retirement benefits.[155] As the Uniform Code of Military Justice made its way through Congress the Court of Military Appeals emerged as the principle check on the abuses of command control. The injection of lawyers into the military judicial system and the express extension of substantive rights held some promise for improvement[156] but the Code Committee had not changed the basic structure of military justice. The commander still dominated the courts-martial system.[157] Commenting on President Truman's signing of the UCMJ the New York Times noted,

> The code, good as it is, does not go far enoguh in its changes. In one important respect, especially, it falls short. It retains the command control of the court-martial. The Court is actually appointed and convened by a commanding officer of the individual to be tried. This necessarily leaves the system open to the charge of the possible presence of prejudice or pressure from time to time.[158]

Article 37 of the UCMJ prohibited the unlawful influencing of a court-martial[159] and Article 98 provided for the punishment of anyone who "knowingly and willingly" failed to follow the procedural guidelines of the Code.[160] However, these provisions at-

[154] *Id.*, at 1446 (the vote was 62 to 9 in favor of the reported Uniform Code of Military Justice with 25 not voting).

[155] H.R. REP. No. 1946, 81st Cong., 2d Sess. 4 (1950).

[156] Note 112 *supra.*

[157] UCMJ, arts. 9, 10 (authority to impose pre-trial restraint); art. 15 (power to impose non-judicial punishment; forfeiture of pay, reduction in grade, restriction, extra duty, withholding of privileges); arts. 22, 23, 24 (power to convene courts-martial); art. 25 (power to appoint court members); art. 26 (power to appoint law officer); art. 27 (power to appoint trial counsel and defense counsel); art. 28 (power to appoint court-reporter and interpreters); art. 29 (power to excuse court members and appoint new members during the course of a trial). For reviewing powers *see* note 113, *supra.*

[158] New York Times, May 8, 1950, at 22, col. 3.

[159] "No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. . . ." UCMJ, art. 37.

[160] UCMJ, art. 98. As far as the author can determine there have been no prosecutions against a convening authority under this article although numerous cases have been reversed for command influence.

tacked the symptoms not the problems and charges of command influence have not been extinguished.[161] Presented with a paucity of provisions dealing with command control and confronted with the public demand for curbing command control it is not surprising that Congressmen viewed the Court of Military Appeals as the key to the entire Code. The House Report clearly evidences the connection made by Congress:

> Article 67 contains the most revolutionary changes which have ever been incorporated in our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly on matters involving military justice.[162]

Congressman Sabath labeled the Court of Military Appeals the most important part of the Code.[163] Senator Kefauver called the Court "a great step toward civilian influence in our military justice." [164] Senator Morse proclaimed, "I can think of no greater assurance of justice to them [servicemen] than a supreme appellate court comprised of civilians appointed by the President with the advice and consent of the Senate." [165] Congressional expectations for the Court of Military Appeals were best articulated by Representative Philbin:

> This court will be completely detached from the military in every way. It is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every member of Congress intends it should, as a great effective, impartial body sitting at the topmost rank of the structure of military justice and insuring as near as can be insured by any human agency,

[161] For an examination and attack on command influence in the military since the passage of the UCMJ *see*, West, *Command Influence*, CONSCIENCE AND COMMAND 73 (J. Finn. ed. 1971); Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 87–97 (1970); WEST; Comment, *The Military Justice Act of 1968: Congress Takes Half-Steps Against Unlawful Command Influence*, 18 CATH. U. L. REV. 429 (1969). Senator Mark Hatfield and Senator Birch Bayh are among those who have recently introduced bills in Congress aimed at eliminating active command participation in the court-martial process. S. 4168–78, 91st Cong. 2d. Sess. (1970) and S. 1127, 92d Cong., 1st. Sess. (1971). These proposals have been reviewed in Rothblatt, *Military Justice: The Need for Change*, 12 WM. AND MARY L. REV. 455 (1971); Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971).

[162] H.R. REP. No. 491, 81st Cong., 1st Sess. 6 (1949).

[163] 95 CONG. REC. 5719 (1949).

[164] 96 CONG. REC. 1445 (1950).

[165] *Id.*, at 1441.

absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over courts-martial cases and civilian review of the judicial proceedings and decisions of the military.[166]

III. THE COURT OF MILITARY APPEALS AND THE ADMINISTRATION OF MILITARY JUSTICE

Notwithstanding the assertions of its drafters and the claims of congressmen the Uniform Code of Military Justice left in doubt the potential of the Court of Military Appeals as an effective appellate tribunal. The power of the Court was circumscribed by the provisions of Article 67 and further restricted by other articles of the UCMJ. The Court also entered an environment that was less than enthusiastic about its creation. Nevertheless, the Court of Military Appeals assumed a general supervisory role over the administration of military justice. The assumption of this role was not without difficulty and promoted criticism. An understanding of the obstacles facing the maiden tribunal and their resolution is necessary to any critical evaluation of the Court of Military Appeals.

A. *ORGANIZATION OF THE COURT*

On May 22, 1951, President Truman nominated Robert E. Quinn,[167] George W. Latimer,[168] and Paul W. Brosman,[169] to be the first judges of the Court of Military Appeals. Mr. Quinn was designated to serve as Chief Judge and to receive the first full 15 year term; Mr. Latimer was to serve the initial 10 year term and Mr. Brosman was designated to serve the short 5 year term. The nominees had excellent legal qualifications and,

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[166] 95 CONG. REC. 5726 (1949).

[167] A.B., Brown University, 1915; LL.B., Harvard, 1918; Lt. Gov. of R.I., 1932–36; Gov. of R.I., 1937–39; judge, Superior Court of R.I. from 1941; Legal Officer, First Naval District (Cpt. USNR), 1942–45; Chief Judge, Court of Military Appeals 1951–1971; Assoc. Judge from 23 June 1971; reappointed by President Johnson in 1966 for the term expiring May 1, 1981.

[168] LL.B. University of Utah, 1924; private practice, 1925–40; during W.W. II served as Colonel on General Staff of the National Guard and AUS; judge, Utah Supreme Court, 1947–51; Assoc. Judge Court of Military Appeals, 1951–61; has lately been in public limelight as chief defense counsel for Lt. Calley.

[169] A.B., Indiana University, 1924; LL.B., University of Illinois, 1926; J.S.D., Yale University, 1929; member of faculty of Indiana University, 1924–28; law professor at Tulane University, 1929–37; Dean of Tulane Law School, 1937–42; worked in Office of Judge Advocate General in Army Air Corps, 1942–45; Judge Brosman died of a heart attack in his chamber on Dec. 21, 1955.

indicative of the touch of a politician, the nominees had served in different branches of the armed services during the Second World War. President Truman's selections were not "lame ducks" and were confirmed without question by the Senate on June 19, 1951.[170] Although the Court of Military Appeals was to be located in the Department of Defense for administrative purposes [171] the Court was first housed in the Internal Revenue Building sharing facilities with the U.S. Court of Customs and Patent Appeals. Shortly after it began operation the Court moved to its present location at 5th and E Streets, Northwest, Washington, D.C. Confronting a potential backlog of 8,500 cases [172] the Court was provided Commissioners to assist in reviewing cases and a Clerk of the Court for administrative requirements.[173] At the first session of the Court, July 25, 1951, the first 47 members were admitted to the bar of the Court of Military Appeals.[174] Although the first case was docketed on July 8, 1951, the Court did not hear arguments until September 7, 1951. The first case argued became the first case decided on November 8, 1951.[175] The judges

[170] 97 CONG. REC. 6746–47 (1951).

[171] UCMJ, art. 67(a)(1). The administrative assistance from the Department of Defense involves such matters as the running of security checks on the Court's personnel and provision of supplies. However, the Court's budget is separately funded by Congress although disbursed through the Department of Defense.

[172] Joint Hearings on S. 745–62 and 2906–7 Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary and a Special Subcomm. on Armed Services, 89th Cong., 2d Sess., 284 (1966) (testimony of Robert E. Quinn, Chief Judge, Court of Military Appeals).

[173] The commissioners, who perform the function of law clerks, are under the direction of Chief Commissioner Richard L. Tedrow. The former commissioners have provided the best sources for insight into the daily operation of the Court of Military Appeals. R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES, ch. 17 (1956); B. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL, ch. VI (1957); Fedele, *Appellate Review in the Military Justice System*, 15 FED. BAR. J. 399 (1955); Walker and Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 VAND. L. REV. 228 (1953). A former chief of the Army Defense Appellate Division has recently described the functioning of military appellate review in Ghent, *Military Appellate Processes*, 10 AM. CRIM. L. REV. 125 (1971). Alfred C. Proulx has been the Clerk of the Court since its inception and is responsible for the receipt and recording of all papers and pleadings filed with the Court.

[174] As of December 31, 1970, there had been 15,751 admitted to the Court's bar including 25 foreign attorneys. 1970 Annual Report, U.S. Court of Military Appeals and The Judge Advocate General 8 [hereinafter cited as ANNUAL REPORT] (the statistics here and in the following pages are not current as the 1970 Annual Report has not been circulated).

[175] United States *v.* McCrary, 1 U.S.C.M.A. 1, 1 C.M.R. 1 (1951). The opinions of the Court of Military Appeals are published by The Lawyers Cooperative Publishing Company in advance sheet and final report form. In addition the armed services publish various journals and law reviews con-

of the Court of Military Appeals were not unmindful of their controversial origin but they nevertheless brought to their work a healthy skepticism and a desire to upgrade military justice.[176] It is noteworthy that the judges adopted "United States Court of Military Appeals" as their official title.[177] The addition of the words "United States" to the title passed by Congress represents what has been a major endeavor of the Court throughout its history—a quest for the recognition and prestige of a court belonging to the federal judiciary.

B. *JURISDICTIONAL LIMITATIONS ON THE COURT OF MILITARY APPEALS*

1. *The Scope of Review.* Although not evident by a reading of Article 67, the Court of Military Appeals cannot review every court-martial. The Court is limited to cases reviewed by a Court of Military Review[178] which in turn reviews cases "in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more."[179] The Court of Military Appeals must re-

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cerning the Court's work. *See* The Advocate, A Monthly Newsletter for Military Defense Counsel (a recent and excellent addition to references for a military lawyer prepared by Defense Appellate Division of U.S. Army Judiciary); JAG JOURNAL (Navy legal publication); JAG L. REV. (Air Force periodical); JUDGE ADVOCATE LEGAL SERV. (biweekly Army pamphlet digesting latest court decisions and matters of interest to military law practitioners); MIL. L. REV. (quarterly law review under auspices of the Army Judge Advocate General's School). For the best single reference to the decisions of the Court of Military Appeals, *see* R. TEDROW, DIGEST, ANNOTATED AND DIGESTED OPINIONS OF U.S. COURT OF MILITARY APPEALS (Supp. 1968).

[176] Latimer, *Military Justice*, 45 LAW LIB. J. 148 (1952) (speech given to Law Librarian's Society of Washington, D. C., on March 20, 1952); *Symposium on Military Justice, Forward: Comments by the Court*, 6 VAND. L. REV. 161 (1953).

[177] U.S.C.M.A. R. Prac. and P. 1.

[178] UCMJ, art. 66. There is a Court of Military Review for each service. Although article 66(a) provides that members of these tribunals may be civilian, only the Coast Guard has complete civilian membership. The Navy appellate tribunals also have a civilian member as part of a three judge panel. These appellate courts were formerly titled boards of review, until the Military Justice Act of 1968 sought to bolster their prestige by changing their name.

[179] UCMJ, art. 66(b). A Court of Military Review may review general courts-martial not meeting the sentence requirements if a Judge Advocate General refers such a case. UCMJ, art. 69. These intermediate tribunals also rule on petitions for new trial if they possess a petitioner's record of trial. UCMJ, art. 73. The Court of Military Appeals will not assume jurisdiction until the intermediate appellate tribunal has acted finally in a case. United States v. Reeves, 1 U.S.M.C.A. 388, 3 C.M.R. 122 (1952). However, once a

view cases in which the sentence extends to death,[180] involves a general or flag officer[181] or is certified by a Judge Advocate General after a decision of a Court of Military Review.[182] Upon

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petition for review in COMA is filed in proper military channels the Court of Military Review may not entertain a motion to reconsider its decision. United States *v.* Garcia, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954) (adjudged sentence of nine months confinement and $500 fine or confinement up to four additional months until paid gave jurisdiction). An administrative separation of a petitioner during the appeal process does not divest COMA of its jurisdiction. *E.g.*, United States *v.* Entner, 15 U.S.C.M.A. 564, 36 C.M.R. 62 (1965); *but see*, United States *v.* Goguen, 20 U.S.C.M.A. 527, 43 C.M.R. 367 (1971) (COMA reaction to federal court ordered discharge of conscientious objector).

[180] UCMJ, art. 67(b)(1). There have been 35 cases involving a death penalty reviewed by the Court. ANNUAL REPORT 14. Twelve persons have been executed under the UCMJ, the last in 1961. STATISTICAL ABSTRACT.

[181] *Id.*, Only one general and one flag officer have been finally convicted since 1951. United States *v.* Hooper, 11 U.S.C.M.A. 99, 28 C.M.R. 352 (1960) (retired Rear Admiral was charged and convicted of sodomy, public association with known sexual deviates, and the commission of an indecent, lewd and lascivious act; sentenced to dismissal and total forfeitures; COMA affirmed after having once remanded for a new post-trial review); United States *v.* Grow, 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953) (Major General charged and convicted of an infraction of a security regulation, two offenses of dereliction of duty, and another security violation; he was reprimanded and suspended from command for six months; the charges stemmed from his recording of top secret material in a personal diary, the information being photographed and appearing in a communist publication six months later; COMA affirmed the findings and sentence). The constitutionality of Article 67(b)(1) was sustained on a motion by a petitioner claiming a denial of equal protection after the Court of Military Appeals had denied his original petition for review. United States *v.* Gallagher, 15 U.S.C.M.A. 391, 35 C.M.R. 363 (1965). The constitutionality of Article 67(b)(1) and the judgment of the Court was upheld in Gallagher *v.* Quinn, 363 F. 2d 301 (D.C. Cir 1966), *cert. denied* 385 U.S. 881.

[182] UCMJ, art. 67(b)(2). Through 1970 there had been 508 cases certified to COMA with the Navy Judge Advocate General certifying the most, although the Army has significantly more courts-martial. A Judge Advocate General may use his certification power and referral power under Article 69, *supra* note 179, to obtain review by COMA of a general court-martial not otherwise within the sentence jurisdiction of COMA. United States *v.* Monett, 16 U.S.C.M.A. 179, 36 C.M.R. 335 (1966) (procedure sustained as a valid exercise of congressional discretion; central purpose seen as providing for uniformity among the services). In certifying a case the Judge Advocate General is not limited to an adverse decision from a Court of Military Review, United States *v.* Zimmerman, 2 U.S.C.M.A. 12, 6 C.M.R. 12 (1952), and may certify a case tried under the laws of war as well as under the UCMJ, United States *v.* Schultz, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952). The Court may enlarge the issues upon request of an accused, United States *v.* Simone, 6 U.S.C.M.A. 146, 19 C.M.R. 272 (1955); United States *v.* Zimmerman, 1 U.S.C.M.A. 66, 1 C.M.R. 66 (1952). The Court has indicated its dislike of advisory opinions, *e.g.*, United States *v.* Fisher, 7 U.S.C.M.A. 270, 22 C.M.R. 60 (1956) (refused to answer question on law officer instruction where immaterial to verdict), and has dismissed some questions as moot, *e.g.*, United States *v.* Bedgood, 12 U.S.C.M.A. 16, 30 C.M.R. 16 (1960). Also, the

the petition of an accused showing good cause the Court may review decisions of the Court of Military Review.[183] The Court of Military Appeals has liberally construed petition restrictions on an accused and in promulgating its own rules allowed for the consideration of issues not raised by a petition.[184] Under these limitations the Court had no appellate jurisdiction over summary courts-martial [185] and can review only a small fraction of special

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Court cannot answer a question of fact upon certification. United States *v.* Remele, 13 U.S.C.M.A. 617, 33 C.M.R. 149 (1963). The actions of the Court in refusing to answer certified questions, disposing of cases on issues not raised, and placing a time limitation on certification (30 days, U.S.C.M.A. R. Prac. and P. 25) has been criticized as denying The Judge Advocates General their historical and statutory authority to promote clarity of law and harmonize conflicting Court of Military Review opinions. Mummey, *Judicial Limitations Upon a Statutory Right: The Power of The Judge Advocate General to Certify Under Article 67(b)(2)*, 12 MIL. L. REV. 193 (1961).

[183] UCMJ, art. 67(b)(3). The Court's jurisdiction is based on sentence as received by a Court of Military Review not after a Court of Military Review action. United States *v.* Reid, 12 U.S.C.M.A. 497, 31 C.M.R. 83 (1962).

[184] U.S.C.M.A. R. Prac. and P. 4 states in relevant part:

> The Court may, *in any case, however, review other matters of law which materially affect the rights of the parties* . . . . (Emphasis added.)

The underlined words were utilized by the Court not simply for recognizing plain error but for conducting a de novo review. The adoption of this rule is discussed in Feld, *Development of the Review and Survey Powers of the United States Court of Military Appeals*, 12 MIL. L. REV. 177, 183–90 (1961).

Judge Latimer discusses standards utilized by the early Court in *Good Cause in Petitions for Review*, 6 VAND. L. REV. 163 (1953). A former commissioner reported that through January 1958, 35% of the petitions granted were on issues not raised in the petition for review. Carney, *The United States Court of Military Appeals*, 5 FED. BAR NEWS 100, at 102 (1958). Through 1969, the Court had granted review in 2,656 cases out of 23,032 petitions received. 1970 ANNUAL REPORT 14:15. The Court will relax the rules for content of petition to prevent an injustice. United States v. Marshall, 4 U.S.C.M.A. 607, 16 C.M.R. 181 (1954); United States v. Jackson, 2 U.S.C.M.A. 179, 7 C.M.R. 55 (1953). Article 67(c) of UCMJ imposes a 30-day limit on right to petition upon notification of Court of Military Review decision. Again, COMA has been liberal in its statutory construction. Filing within 30 days in military channels, with convening authority for example will satify the statue. United States *v.* Jackson, *supra*. If an accused was misled or defrauded the Court will waive the 30-day limit. United States v. Ponds, 1 U.S.C.M.A. 385, 3 C.M.R. 119 (1952) (no waiver granted). Insanity during a board of review proceeding will toll the appellate process. United States *v.* Ball, 7 U.S.C.M.A. 744, 23 C.M.R. 208 (1957). The 30-day waiver right cannot be waived. *E.g.*, United States *v.* Green, 10 U.S.C.M.A. 561, 28 C.M.R. 127 (1959).

[185] UCMJ, art. 20. Summary courts-martial may not impose punitive discharge or confinement in excess of one month.

courts-martial.[186] Also, some general courts-martial are not subject to the Court's jurisdiction.[187] Since the UCMJ became effective on May 31, 1951, there have been 2,873,470 courts-martial;[188] the Court of Military Appeals has acted in 22,594 cases and rendered 2,659 opinions.[189] The Court was not granted sentencing or clemency powers as these were retained by the military establishment.[190] While the Court's decisions are final as to law, the executions of certain sentences require the approval of the President[191] and the Secretary of the interested service.[192] Undoubt-

[186] UCMJ, art. 19. Special courts-martial may not impose confinement in excess of six months and may impose a bad-conduct discharge only if a verbatim record has been made of the proceedings. BCD-specials were practically non-existent in the Army until the increase in courts-martial the past couple of years. The Navy (including Marine Corps) and Air Force use BCD-specials more frequently.

[187] The Court would not review general courts-martial in which the sentence, as approved by the convening authority did not meet the requirements in Article 66(b), *supra* note 179. However, a Judge Advocate General could refer such a case to a Court of Military Review and certify to COMA, *supra* note 182.

[188] Figure compiled from 1951–1969 Annual Reports, *supra* note 174. The Court of Military Appeals had no jurisdiction over cases final as of May 31, 1951 *see*, United States *v.* Sonneschein, 1 U.S.C.M.A. 64, 1 C.M.R. 64 (1951).

[189] ANNUAL REPORT 13–15. Thus, the Court of Military Appeals has had an opportunity to review approximately .78% of the courts-martial convened since its establishment. This figure is misleading in view of the overwhelming number of summary and special courts-martial as compared to the general courts-martial which may impose severe punishments. Data from the 1962–1970 Annual Reports indicates that the Court of Military Appeals has acted in approximately 17.3% of the cases referred to a Court of Military Review (Board of Reviews). The Courts of Military Review have acted in approximately 6% of courts-martial. The data presented here is somewhat incomplete but does accurately portray the limited scope of appellate review. For a summary comparison of civilian and military appellate workloads *see* Karlen, *Civilian and Military Justice at the Appellate Review*, 1968 WIS. L. REV. 786.

[190] Notes 113, 179 *supra*. The Military Justice Act of 1968 amended Article 69 to provide for the review in the Office of the Judge Advocate General of summary and special courts-martial not otherwise reviewable.

[191] UCMJ, art. 71(a). Sentences involving death or involving a general or flag officer must be approved by the President. There is no express provision for review by the President of a life sentence or a dismissal of an officer, Article 76 excepts "the authority of the President" from the finality of the appellate review of courts-martial. Perhaps this is the basis for President Nixon's extraordinary declaration of intended review of Lt. Calley's case. If so, the President can do more than federal courts for whom Article 76 has been construed to bar all but *habeas corpus* proceedings, and then the test is a narrow one of "full and fair consideration." Burns *v.* Wilson, 346 U.S. 137 (1953). *See* note 41 *supra*. The President does have pardoning powers under Article 2 of the Constitution but this power is not to conduct a "review." The ambiguity of the President's declaration in the Calley case casts an undesirable shadow over the military appellate process.

[192] UCMJ, art. 71(b). A sentence of dismissal for an officer (not a general or flag officer), cadet, or midshipman must be approved by the Secretary of

edly, the incomplete control over the administration of military justice made the judges realize that the successful implementation of the UCMJ depended as much on the participants in lower military courts as on the decisions of the Court of Military Appeals.[193]

2. *Questions of Law and Fact.* The Uniform Code of Military Justice restricted the Court of Military Appeals to deciding questions of law [194] with the exceptions of finding insufficient evidence as a matter of law [195] and ruling on a petition for a new trial.[196] These limitations are not atypical of appellate tribunals but the UCMJ only restricts the civilian Court of Military Appeals and not the military dominated Courts of Military Review. These lower appellate tribunals can weigh evidence, judge the credibility of witnesses, decide issues of fact and determine the appropriateness of a sentence.[197] The disparity between the powers of these appellate tribunals caused some initial skepticism about the potential influence of the Court of Military Appeals.[198] Court of Military Review factual determinations are binding on the Court,[199] however, the Court has proclaimed that it is not always bound by a Court of Military Review characterization of a decision as fact.[200] The nebulous distinction between questions of law and questions of fact and the liberal

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the Department concerned. As an exception to the finality provisions of Article 76, Article 74 provides that a Secretary or his designee may remit or suspend any sentence not approved by the President and may substitute an administrative discharge for a punitive discharge or dismissal.

[193] *See* Quinn, *United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961); Address by Judge George Latimer, Army Judge Advocates Conference, September 20–24, 1954.

[194] UCMJ, art. 67(d).

[195] *Id.*, art. 67(e).

[196] *Id.*, art. 73.

[197] *Id.* art. 66(c).

[198] Keefe, *Codified Military Justice*, 33 CORNELL L. Q. 151, 164 (1949) (Professor Keefe saw the proposed tribunal as a weak administrative body that would undoubtedly become subservient to the military as the end of their terms drew near).

[199] United States *v.* Gwaltney, 20 U.S.C.M.A. 488, 43 C.M.R. 328 (1970); United States *v.* Phifer, 18 U.S.C.M.A. 508, 40 C.M.R. 220 (1969) (unless lower court conclusion is arbitrary and capricious); United States *v.* Remele, 13 U.S.C.M.A. 617, 33 C.M.R. 149 (1963); United States *v.* Alaniz, 9 U.S.C.M.A. 533, 26 C.M.R. 313 (1958).

[200] United States *v. Wille* 9, U.S.C.M.A. 623, 26 C.M.R. 403 (1958) (concurrence in government concession of error is not fact-finding); United States *v.* Hendon, 7 U.S.C.M.A. 429, 22 C.M.R. 219 (1956) (board of review finding lesser included offense of AWOL in desertion was based on law and thus reviewable); United States *v.* Benson, 3 U.S.C.M.A. 351, 12 C.M.R. 107 (1953) (board of review characterization of ruling on sentence as fact not binding).

construction by the Court of its powers minimizes the significance of this limitation on the Court of Military Appeals.

In determining the sufficiency of the evidence the Court first employed a "substantial evidence test" [201] but shortly thereafter embraced a broader test: "[W]e must not reverse unless we believe that reasonable men would be in accord in holding that a rational hypothesis other than that of guilty may be drawn from the evidence." [202] Judge Brosman defended the utilization of the "reasonable hypothesis test" noting,

> In any event the view we take is the one we regard as demanded by the realities and necessities of the military judicial system of which we are a part. In our opinion the adoption of any narrower conception would be ill considered and inappropriate to the mission of this Court.[203]

The Court will not sustain a conviction based on suspicion, conjecture, and speculation.[204] The Court has generally recognized its inability to weigh evidence and judge the credibility of witnesses [205] but will weigh evidence to determine sufficiency of the evidence [206] and will disregard testimony which is inherently incredible or manifestly unbelievable.[207] Although the present standard for determining sufficiency of the evidence is inadequately articulated, the Court of Military Appeals appears primarily concerned about the application of the reasonable doubt standard at courts-martial. A study of the 1969 term of the Court of Military Appeals finds the test "is not whether it was reasonable or likely that the facts occurred a certain way; it is rather whether there was enough evidence so that the court members could have determined them a certain way." [208] This

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[201] United States *v.* McCrary, 1 U.S.C.M.A. 1, 1 C.M.R. 1 (1951).

[202] United States *v.* O'Neal, 1 U.S.C.M.A. 138, 147, 2 C.M.R. 44, 54 (1952). For a criticism of the adoption of this test *see* Goulet, *The United States Court of Military Appeals and Sufficiency of the Evidence*, 42 GEO. L. J. 108 (1953).

[203] *Id.*, at 147, 2 C.M.R. at 53.

[204] *Id.*, at 142, 2 C.M.R. at 49.

[205] *E.g.*, United States *v.* Albright, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958); United States *v.* Sell, 3 U.S.C.M.A. 302, 11 C.M.R. 202 (1953).

[206] *E.g.*, United States *v.* Shull, 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952).

[207] *E.g.*, United States *v.* Lee, 3 U.S.C.M.A. 501, 13 C.M.R. 57 (1954); United States *v.* Conrad, 15 U.S.C.M.A. 439, 35 C.M.R. 411 (1965); *but see* United States *v.* Kuefler, 14 U.S.C.M.A. 136, 33 C.M.R. 348 (1963); United States *v.* Moore, 16 U.S.C.M.A. 375, 36 C.M.R. 351 (1966).

[208] *The Advocate, A Monthly Newsletter for Military Defense Counsel*, Dec. 1970, at 20.

concern sometimes leads the Court to determinations of fact under the rubric of sufficiency of evidence.[209]

To exercise its statutory fact finding power in ruling on petitions for a new trial the Court of Military Appeals must be in possession of the record of trial at the time the petition is made.[210] In performing this judicial function the Court may appoint a referee to investigate facts.[211] The Court rules on relatively few petitions in a fact finding capacity but also rules on the legality of a Court of Military Review disposition of a petition for a new trial.[212] Before relief will be granted the petitioner must show that the basis for a new trial will affect the conviction and prevent an injustice.[213] For newly discovered evidence to provide the basis for a granting of a new trial it must indicate an injustice, have been discovered after trial or not discoverable at the time of trial with due diligence, have been admissible at trial, and be likely to produce a favorable result at a new trial.[214] If the petition alleges fraud on the court it must not have been known to the accused at the time of trial.[215]

C. *PREJUDICIAL ERROR*

Article 59(a) of the Uniform Code of Military Justice provides:

> A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.[216]

This perpetuated the "harmless error rule" that was ennacted in the 1916 Articles of War.[217] In explicating the rule the 1951

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[209] *See, e.g.*, United States v. Harvey, 21 U.S.C.M.A. 39, 44 C.M.R. 93 (1971) (evidence insufficient to sustain arson conviction); United States v. Maglito, 20 U.S.C.M.A. 456, 43 C.M.R. 296 (1971) (evidence sufficient for conviction of disobedience of an order); United States v. Morris, 20 U.S.C.M.A. 446, 43 C.M.R. 286 (1971) (unrebutted defense psychiatric testimony of lack of mental responsibility meant insufficient evidence to sustain conviction of robbery and assault); United States v. McCown, 20 U.S.C.M.A. 409, 43 C.M.R. 249 (1971) (evidence sufficient for conviction of failing to go to formation); United States v. Brooks, 20 U.S.C.M.A. 28, 42 C.M.R. 220 (1971) (evidence insufficient to sustain conviction for wrongful appropriation).

[210] UCMJ, art. 73.

[211] U.S.C.M.A. R. Prec. and P. 54.

[212] *E.g.*, United States v. Chadd, 13 U.S.C.M.A. 438, 32 C.M.R. 438 (1963); United States v. Thomas, 3 U.S.C.M.A. 161, 11 C.M.R. 161 (1953).

[213] United States v. Chadd, 13 U.S.C.M.A. 438, 32 C.M.R. 438 (1963).

[214] *E.g.*, United States v. Woolbright, 12 U.S.C.M.A. 450, 31 C.M.R. 36 (1961); United States v. Childs, 5 U.S.C.M.A. 270, 17 C.M.R. 270 (1954).

[215] United States v. Walters, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954) (accused held to waiver of omissions from record of trial).

[216] UCMJ, art. 59.

[217] ARTICLES OF WAR, 1916, art. 37.

Manual for Courts-Martial drew from the opinion of Justice Rutledge in *Kotteakos* v. *United States*.[218] In its third case The Court of Military Appeals applied this harmless error doctrine where the president of the court, after a plea of guilty, announced findings of guilty without having instructed the court and without closing the court as required by statute.[219] Judge Latimer, writing for the unanimous Court, found no prejudicial error because the accused had plead guilty. However, a few weeks later the Court carved out a significant exception to the restrictions of Article 59. In *United States* v. *Clay*,[220] a court-martial was closed after the introduction of evidence without the president having instructed the court members on the elements of the offense, the presumption of innocence and the burden of proof where an accused had plead guilty to a uniform violation but had plead not guilty to a disorderly conduct charge. The Navy Board of Review affirmed the convictions since the evidence was of such quantity and quality to establish all the elements of the offenses and overcome the legal presumptions. The Court of Military Appeals citing *Lucas* also found no prejudice with respect to the uniform violation. But the failure to give the required instructions for the disorderly conduct charge after a plea of not guilty was held error materially prejudicial to the substantial rights of the accused. Judge Latimer, writing for the unamimous Court, declared:

> There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses. Some of these are more important than others, but all are of sufficient importance to be a significant part of military law. We conceive these rights to mold into a pattern similar to that developed in federal civilian cases. For lack of a more descriptive phrase, we label the pattern as 'military due process' and then point up the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted.[221]

By fashioning the concept of military due process the Court had expanded the intended meaning of Article 59 but even this expansion did not satisfy Judges Brosman and Quinn. In *United*

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[218] 328 U.S. 750 (1946). *See* Legal and Legislative Basis for the Manual for Courts-Martial, United States, at 124 (1951).

[219] United States *v.* Lucas, 1 U.S.C.M.A. 19, 1 C.M.R. 19 (1951) (citing Kotteakos).

[220] 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). This decision was noted favorably in 50 MICH. L. REV. 1084 (1952); 27 N.Y.U. L. REV. 163 (1952); but was viewed unfavorably as not in accord with civil rules in 20, GEO. WASH. L. REV. 490 (1952).

[221] *Id.*, at 77, 1 C.M.R. 77.

States v. *Lee* [222] Judge Brosman proclaimed certain "creative and indwelling principles" in addition to the mandate of the code would prompt the Court to take corrective action. Five days later Judge Brosman labeled this concept "general prejudice" in finding prejudicial error where the president of a court had usurped the function of the law member.[223] Judge Brosman reversed the conviction because the trial,

> disclosed an inherently and generally prejudicial disregard for an important segment of the procedures deemed necessary by Congress. . . . To condone the practices reflected in this record would be to invite subversion of what we cannot escape regarding as an overriding policy of vital import—a 'critical and basic norm operative in the area' of military justice.[224]

The Chief Judge applied general prejudice in reversing a conviction where the record of trial indicated that the law officer had conferred with Court members in the absence of the accused and his counsel.[225] The Court gradually discarded the notion of general prejudice but has maintained an expansive interpretation of "error materially prejudicial to the substantial rights of the accused." [226]

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[222] 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

[223] United States *v.* Berry, 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952).

[224] *Id.*, at 241, 2 C.M.R. 147.

[225] United States *v.* Keith, 1 U.S.C.M.A. 493, 4 C.M.R. 85 (1952).

[226] Although the term, "military due process," has become generally accepted as representing the various procedural and substantive rights of a military accused, Judge Ferguson in a recent decision called the assignment of a trial counsel who was the endorser of the efficiency reports and superior officer of the defense counsel "generally prejudicial and requires reversal" in United States *v.* Hubbard, 20 U.S.C.M.A. 482, 43 C.M.R. 322 (1971). The differences between military due process and general prejudice were highlighted in United States *v.* Woods, 2 U.S.C.M.A. 203, 8 C.M.R. 3 (1953), with Judge Latimer devoting eight pages to attacking the notion of general prejudice and Judge Brosman defending the concept in over eight pages. It should be noted that the addition of Judge Darden to the Court appears to have narrowed the concept of prejudicial error. *See, e.g.*, Judge Darden's majority opinions in United States *v.* Davis, 20 U.S.C.M.A. 541, 43 C.M.R. 381 (1971) (inordinate appellate delays do not "ipso facto" demonstrate prejudice); United States *v.* Hubbard, 20 U.S.C.M.A. 482, 43 C.M.R. 322 (1971) (the fact that trial counsel was immediate superior of defense counsel and endorser of his efficiency report is not prejudicial per se and was not found prejudicial). President Johnson nominated Judge Darden to replace the deceased Judge Kilday in November, 1968 for the term expiring on 1 May 1976; President Nixon designated Judge Darden, Chief Judge, effective 23 June 1971. Judge Darden served in the U.S. Navy during World War II, obtained his B.B.A. in 1946 and his L.L.B. in 1948 from the University of Georgia. He was personal secretary to the late Sen. Russell from 1948–51 and was on the professional staff, later Chief of Staff, of the Senate Committee on Armed Services from 1953 until his appointment to COMA.

If fundamental constitutional or codal rights have been violated the error will be prejudicial *per se*.[227] In assessing errors of procedure, evidence, instruction, and conduct of parties the Court weighs the risk of the error influencing the Court members.[228] The concepts of plain error[229] and cumulative error[230] are also employed by the Court of Military Appeals in determining prejudice. The wide ambit of prejudicial error is well exemplified in the rigorous and technical requirements for a judge's inquiries into a guilty plea[231] and into an accused's understanding of his right to counsel.[232] Inasmuch as findings of prejudicial error encompass every phase and participant in the administration of

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[227] *See e.g.*, United States *v.* Kaiser, 19 U.S.C.M.A. 104, 41 C.M.R. 104 (1969) (failure of prosecution to show proper Miranda warning); United States *v.* Reynolds, 16 U.S.C.M.A. 403, 37 C.M.R. 23 (1966) (insufficient Art. 31 warning); United States *v.* Mickel, 9 U.S.C.M.A. 324, 26 C.M.R. 104 (1958) (right to qualified counsel at pre-trial investigation) and cases cited therein. For a criticism of the COMA failure to follow harmless error guidelines of Chapman *v.* California, 386 U.S. 18 (1967) *see* Brown, *Miranda Errors: Always Prejudicial or Sometimes Harmless?*, JAG J., Sep.–Nov., 1969, at 51; Larkin, *When is an Error Harmless?*, JAG J., Dec. 67–Jan. 68, at 65.

[228] United States *v.* Simpson, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959). The Court's test for prejudice on these kinds of errors is most difficult to articulate although doubt tends to be resolved in favor of the accused.

[229] Plain error is that error raised on appeal by the Court of Military Appeals as a result of its *de novo* review. It has been utilized in correcting failure of military judges to give proper instructions. United States *v.* Pond, 17 U.S.C.M.A. 219, 38 C.M.R. 17 (1967); United States *v.* Lell, 16 U.S.C.M.A. 161, 36 C.M.R. 317 (1966); United States v. Stephen 15 U.S.C.M.A. 314, 35 C.M.R. 286 (1965).

[230] The doctrine of cumulative error has been frequently invoked *see e.g.*, United States *v.* Dolan, 17 U.S.C.M.A. 476, 38 C.M.R. 274 (1968); United States *v.* Yerger, 1 U.S.C.M.A. 288, 3 C.M.R. 22 (1952).

[231] United States *v.* Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) (the Court will reverse a conviction unless the record indicates that a judge personally advised the accused of his waiver of the right against self-incrimination, the right to a trial of the facts, the right to confrontation by his plea of guilty; explained each element of the offense to the accused and inquired of the accused whether he committed the crime in question).

[232] United States *v.* Donohew, 18, U.S.C.M.A. 149, 39 C.M.R. 149 (1969) (the Court will reverse unless the record of trial indicates that the military judge made a detailed inquiry into the accused's understanding of his right to counsel). Qualified in United States *v.* Turner, 20 U.S.C.M.A. 167, 43 C.M.R. 7 (1970) (failure to advise accused that if he retained civilian counsel the detailed military counsel could continue in the case not error).

military justice [233] the meaning and application of prejudical error has engendered discussion and criticism of the Court.[234]

D. *EXECUTIVE POWER OVER COURTS-MARTIAL AND THE COURT OF MILITARY APPEALS*

During the 19th century courts-martial were guided by the trial judge advocate and the president of the court. Occasionally, authorities on military law such as DeHart,[235] Winthrop,[236] and Davis [237] were consulted by commanders and the court, but generally rules of evidence were loosely followed and the elements of offenses undefined. Courts-martial under the early Articles of War were essentially non-judicial and non-adversary proceedings. In 1916 Congress expressly authorized the President to provide for rules of procedure and evidence to be followed in courts-martial.[238] The resultant Manual for Courts-Martial became the "Bible" for all parties to a court-martial.[239] Article 36 of the UCMJ continues this executive power providing:

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[233] *See generally, A Survey of the Decisions of the United States Court of Military Appeals*, The Advocate, December 1970, at 2. The scope of prejudicial error is evident by the holdings that a defense counsel cannot concede a punitive discharge in argument on sentence unless the record indicates the accused requested such an argument, United States *v.* Weatherford, 19 U.S.C.M.A. 424, 42 C.M.R. 26 (1970); United States *v.* Mitchell, 16 U.S.C.M.A. 302, 36 C.M.R. 458 (1966), and the finding of ineffective representation where a defense counsel failed to inform the Court of the accused's service in Vietnam and awards, United States *v.* Pointer, 18 U.S.C.M.A. 587, 40 C.M.R. 299 (1969); United States *v.* Rowe, 18 U.S.C.M.A. 54, 39 C.M.R. 54 (1968). It should be noted that all errors do not require reversal as the doctrine of waiver pervades military law and an error may be purged at trial or at any stage on review.

[234] *The Nature and Effect of Error, Review of Courts-Martial, Part I, Initial Review*, 173 (DA Pam 27-175-1, Jun. 1962); Brown, *Miranda Errors: Always Prejudicial or Sometimes Harmless?*, JAG J., Sep.-Nov. 1969, at 51; Kuhfeld, *Prejudicial Error—The Measurement of Reversal by Boards of Review of the U.S. Court of Military Appeals*, 35 ST. JOHN'S L. REV. 255 (1961) (Air Force Judge Advocate General lamenting the ad hoc standard of prejudicial error); Larkin, *When is an Error Harmless?*, JAG J., Dec. 67-Jan. 68, at 65; Wurfel, *Military Due Process: What Is It?*, 6 VAND L. REV. 251 (1953); POWELL REPORT at 194 (criticizing Court's expansive interpretation of Article 59 and proposing a statutory amendment to narrow the scope of review).

[235] DEHART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL (1846).

[236] WINTHROP.

[237] DAVIS.

[238] ARTICLES OF WAR, 1916, art. 38.

[239] United States *v.* Hemp, 1 U.S.C.M.A. 280, 285, 3 C.M.R 14, 19 (1952). The first official Manual for Courts-Martial was published in 1898 and was revised in 1901, 1905, 1908, 1917, 1921, 1928, and 1949. Navy and Marine courts-martial were guided by Naval Courts and Boards which were published and revised in 1923 and 1937.

> (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this code.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to the Congress.[240]

A committee of military officers from the three services drafted the rules and regulations[241] and they were promulgated as the 1951 Manual for Courts-Martial.[242] As could be expected, the Manual did not anticipate every contingency. Although recognizing that the exercise of Presidential authority under Article 36 has the force of law,[243] the Court of Military Appeals unhesitantly assumed the authority to interpret the Manual and to make rules where the Manual was silent. Noting that Article 36 directed the President to federal court practice, the Court looked to federal decisions to determine the qualification of a non-religious witness where the Manual gave no guidance.[244] Among the instances the Court had to consult federal practice included the doctrine of waiver,[245] the commenting on evidence by the law officer,[246] and the rules on multiplicity.[247] The Manual was also found inadequate in providing guidance on instructions.[248] The Court soon found that the Manual not only contained

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[240] UCMJ, art. 36.

[241] Legal and Legislative Basis for the Manual for Courts-Martial, United States (U.S. Gov't. Print. Off. 151).

[242] Exec. Order No. 10214, 16 Fed. Reg. 1303–1419 (1951).

[243] United States *v.* Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962); United States *v.* Villasenor, 6 U.S.C.M.A. 3, 19 C.M.R. 129 (1955); United States *v.* Lucas, 1 U.S.C.M.A. 19, 1 C.M.R. 19 (1951).

[244] United States *v.* Slozes, 1 U.S.C.M.A. 47, 1 C.M.R. 47 (1951).

[245] *E.g.*, United States *v.* Dupree, 1 U.S.C.M.A. 665, 5 C.M.R. 93 (1952) (waiver of unlawfully seized evidence); United States *v.* Bodenheimer, 2 U.S.C.M.A. 130, 7 C.M.R. 6 (1953) (waiver of request for severance in common trial); United States *v.* Kreitzer, 2 U.S.C.M.A. 284, 8 C.M.R. 84 (1953) (waiver of defense of former jeopardy).

[246] United States *v.* Andis, 2 U.S.C.M.A. 364, 8 C.M.R. 164 (1953).

[247] United States *v.* McVey, 4 U.S.C.M.A. 167, 15 C.M.R. 167 (1954).

[248] *E.g.*, United States *v.* Jones, 1 U.S.C.M.A. 276, 3 C.M.R. 10 (1952) (para 166—knowledge is an essential element to "missing movement" charge); United States *v.* Lookinghouse, 1 U.S.C.M.A. 660, 5 C.M.R. 68 (1952) (para 213*d*—law officer must instruct on elements of the offense constituting intent); United States *v.* Grossman, 2 U.S.C.M.A. 406, 9 C.M.R. 36 (1953) (definition of involuntary manslaughter found insufficient). Instructional errors were, and remain, a major contributor to findings of error by the Court. For a catalogue of the Court's decisions and a reference

gaps but that some provisions were in conflict with the UCMJ and the Constitution. A Manual paragraph purporting to authorize confinement on bread and water for greater than three days in addition to a punitive discharge occasioned the first invalidation of the 1951 Manual by the Court of Military Appeals.[249] The Court subsequently overruled Manual provisions concerning the right against self-incrimination,[250] the legality of sentences,[251] and the conduct of courts-martial.[252]

United States v. *Cothern* [253] and *United States* v. *Rinehart* [254] illustrate the dramatic impact on military justice of the Court's overruling the Manual. In *Cothern* the Court of Military Appeals rejected the long-standing practice of inferring desertion from only a prolonged absence without leave. This decision greatly changed the burden of proof required of the government to obtain a conviction of desertion.[255] In *Rinehart*, the practice of court members using the Manual during a court-martial was

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to appropriate instructions, *see*, MILITARY JUDGES' GUIDE (DA PAMPHLET 2 7–9, MAY, 1969).

[249] United States *v.* Wappler, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953). In United States *v.* Clark, 1 U.S.C.M.A. 201, 2 C.M.R. 107 (1952) the Court construed the word "may" in para 73(c), 1951 MCM, in referring to instructions on lesser included offenses as mandatory rather than permissive so as to avoid a conflict with Article 51(c), UCMJ. While not an express overruling this decision was a substantial modification of the Manual.

[250] United States *v.* Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953) (para 150, accused may not be ordered to produce a handwriting specimen); United States *v.* Green, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953) (para 150, accused may not be compelled to speak for voice identification). These cases were noted in 22 GEO. WASH. L. REV. 371 (1954) and 23 GEO. WASH. L. REV. 110 (1954).

[251] United States *v.* Simpson, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959) (provision for automatic reduction of enlisted men invalid; this MCM rule was reinstated by Act of July 12, 1960, Pub. L. No. 86–633, 74 Stat. 468, amending 10 U.S.C. sec. 58(a) (1951); United States *v.* Smith, 10 U.S.C.M.A. 152, 27 C.M.R. 227 (1959) (automatic dismissal of confined officer invalid); United States *v.* Varnadore, 9 U.S.C.M.A. 471, 26 C.M.R. 251 (1958) (automatic discharge with over 6 months confinement invalid).

[252] *E.g.*, United States *v.* Jones, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956) (court in closed session, not law officer, must rule on challenges); United States *v.* Drain, 4 U.S.C.M.A. 646, 16 C.M.R. 220 (1954) (deposition for use in general court-martial must be taken by qualified counsel).

[253] 8 U.S.C.M.A. 158, 23 C.M.R. 382 (1957).

[254] 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957).

[255] The offense of desertion became one of specific intent requiring extensive proof, costs of procuring witnesses, etc. The number of desertion convictions has decreased since Cothern and its progeny. The number of convictions for absence without leave has increased correspondingly as it requires relatively little prosecutorial effort. Cothern was critically noted in Avins, *Proof of Desertion Through Prolonged Absence*, 44 CORNELL L. Q. 356 (1959); 46 GEO. L.J. 354 (1958).

forbidden. In the opinion of the Court, Judge Ferguson [256] cited the danger of court members untrained in the law indiscriminately using legal materials, the invalidity of many Manual provisions, and the significance of the role of the law officer as the basis for the decision. Anticipating the reaction to this sharp break with tradition Judge Ferguson stated:

> We are fully aware that the change in the system of military law occasioned by this decision represents a substantial departure from prior service practice. However, we cannot but feel that such change was imperatively needed if the system of military law is to assume and maintain the high and respected place that it deserves in the jurisprudence of our free society.[257]

This decision, and others overruling or substantially modifying the Manual, did indeed precipitate unfavorable reaction from the military and traditional military law theorists.[258] The Court

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[256] LL.B., University of Michigan, 1913; private practice, 1913–29; circuit judge in Micigan, 1929–43; U.S. Senator from Michigan, 1943–55; LL.D., University of Michigan, 1951; Ambassador to Philippines, 1955–56; associate judge, U.S. Court of Military Appeals, 1956–1971; Senior Judge, 1 May 1971 to present. (The "liberal" on the present Court.)

[257] United States *v.* Rinehart, 8 U.S.C.M.A. 402, 408, 24 C.M.R. 212, 218 (1957). The case was favorably noted in 72 HARV. L. REV. 388 (1958).

[258] The Powell Report, *supra* note 3, recommended sweeping changes in the administration of military justice which were designed, in part, to reverse certain decisions of the Court of Military Appeals. The Powell Report opined that the Court's overruling and modification of Manual provisions was causing undue instability in military justice and therefore suggested that Article 36, UCMJ, be amended to make Presidential rule-making binding on appellate tribunals. *Id.* at 193–195. An article cited by the Powell Report as a source for its findings and recommendations was extremely critical of the Court for ignoring the inherent and statutory authority of the President observing:

> "Each of the decisions referred to has, by invalidating a particular regulation, weakened the good order, morale, or discipline of the armed forces. . . . The belief that many regulations are invalid greatly reduces the apparent risk of punishment. Certainly of punishment. The growing uncertainty encourages wrongdoing, as well as promoting confusion in the administration of military justice."

Fratcher, *Presidential Power to Regulate Military Justice: A Critical Evaluation of the Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 889–90 (1959). The Court's rule-making was also criticized in Richardson, *A State of War and the Uniform Code of Military Justice*, 47 ABA J. 792 (1961) (complaining that formidable body of case law created by COMA would make the UCMJ unworkable in wartime); Wood, *The Rule-Making Power*, 1963 (unpublished thesis presented to The Judge Advocate General's School, Charlottesville, Virginia) (observing that much of the Court's mishandling of Manual provisions stemmed from the failure to distinguish between substantive and procedural rules and labeled the President, not COMA, the "Supreme Court of Military Law"); *see also* notes 279, 283 *infra*. Not all commentators viewed the Court's construction of the Manual unfavorably. *See, e.g.*, Fedele, *The Manual for Courts-Martial—Its Legal*

of Military Appeals was castigated for usurping Presidential authority and for causing instability in military law. However, the Court weathered the brunt of that wave of protest and has continued to interpret, construe, and overrule Manual provisions.[259]

E. *INHERENT POWERS OF THE COURT OF MILITARY APPEALS*

In fulfilling what was perceived as a congressional mandate the Court of Military Appeals not only expanded its statutory powers but also assumed "inherent powers." The Court proclaimed early that its duty was to see that courts-martial were conducted fairly[260] and that it possessed the authority to supervise and regulate the law officer and the court members.[261] In addition, the Court declared that it would intervene whenever it was necessary to prevent a miscarriage of justice or to preserve the integrity of court-martial proceedings.[262] Under the inherent

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Status and the Effect of Decisions of the United States Court of Military Appeals, 23 FORDHAM L. REV. 323 (1954) (noting that military law has come of age under the UCMJ and COMA); Feld, *Courts-Martial Practice: Some Phases of Pretrial Procedure*, 23 BROOKLYN L. REV. 25 (1956) (suggesting that the Court be expressly granted rule-making authority). Judge Quinn has commented on the relationship between the Court of Military Appeals and the Manual in Quinn, *Courts-Martial Practice: A View from the Top*, 22 HASTINGS L. J. 201 (1971).

[259] *E.g.*, United States *v.* Hise, 20 U.S.C.M.A. 3, 42 C.M.R. 195 (1970) (para. 140*a* of the 1969 Manual cannot operate retroactively); United States *v.* Faddis, 18 U.S.C.M.A. 377, 40 C.M.R. 89 (1969) (notwithstanding para 127*b* a sentence of total forfeitures and confinement for one year without punitive discharge is a proper sentence); United States *v.* Metcalf, 16 U.S.C.M.A. 153, 36 C.M.R. 309 (1966) (instructions on riot in para 195*a* of 1951 Manual were found deficient); United States *v.* Bernacki, 13 U.S.C.M.A. 641, 33 C.M.R. 173 (1963) (para 188*b* entitled to consideration but not binding as an interpretation of a statute; COMA rejected its definition of "willful" in regard to damaging personal property). The Manual has been revised to reflect the changes prompted by the decisions of the Court of Military Appeals, the Military Justice Act of 1968, and other proposals suggested by the working group to revise the Manual established by the Judge Advocates General on December 7, 1965. The current Manual for Courts-Martial is Exec. Order No. 10,214, 3 C.F.R. 408 (1970). For an explanation of changes, see *Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition* (DA Pam 27-2, July 1970).

[260] United States *v.* Clay, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

[261] United States *v.* O'Neal, 1 U.S.C.M.A. 138, 144, 2 C.M.R. 44, 50 (1952). *See also* Miller, *Who Made the Law Officer a "Federal Judge?"*,3 MIL. L. REV. 39 (1959).

[262] United States *v.* Drexler, 9 U.S.C.M.A. 405, 408, 26 C.M.R. 185, 188 (1958); United States *v.* Bouie, 9 U.S.C.M.A. 228, 232, 26 C.M.R. 8, 12 (1958).

powers the use of the Manual at trial was forbidden [263] and non-lawyer participation in general courts-martial was prohibited.[264] Despite the lack of statutory authority the Court has, on occasion, acted in a sentencing capacity.[265] In its effort to insure fairness in military justice the Court has broadened the scope of consideration of matters outside the record of trial.[266] A preferred position has been given to insanity issues.[267] The providency of a guilty plea [268] and the adequacy of counsel,[269] the fairness and impartiality of the staff judge advocate's pre- and post-trial advice,[270] and the allegations of unlawful com-

[263] United States *v.* Rinehart, 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1917). In promulgating this rule the Court employed the extraordinary procedure of allowing the service 30 days in which to implement the rule. This 30 day rule was subsequently followed in United States *v.* Donohew, 18 U.S.C.M.A. 149, 39 C.M.R. 49 (1969) (establishing principles for inquiry into understanding of right to counsel) and United States *v.* Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) (outlining guidelines for inquiry into providency of guilty plea).

[264] United States *v.* Kraskouskas, 9 U.S.C.M.A. 607, 610, 26 C.M.R. 387, 390 (1958) (concluded that "in order to promote the best interests of military justice, it is imperative that only qualified lawyers be permitted to practice before a general court-martial"). *See, Military Justice: A New Attempt to Advance Individual Rights*, 1959 DUKE L. J. 470.

[265] The Court has ordered charges dismissed where records of trial normally would have been remanded where under the circumstances "no useful purpose is served by continuing the proceedings." United States *v.* Adams 20 U.S.C.M.A. 573, 44 C.M.R. 3 (1971); United States *v.* Fortune, 20 U.S.C.M.A. 293, 43 C.M.R. 133 (1971); United States *v.* Ervin, 20 U.S.C.M.A. 97, 42 C.M.R. 289 (1970); United States *v.* Conrad, 15 U.S.C.M.A. 439, 35 C.M.R. 441 (1965); United States *v.* Lyon, 15 U.S.C.M.A. 307, 35 C.M.R. 279 (1965). Also, a board of review reassessment of a sentence was undisturbed although the Court reinstated a conviction for desertion in United States *v.* Batson, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960). However, the Court has also not remanded cases for sentence reconsideration after finding significant error in sentence instructions, *see e.g.*, United States *v.* Reams, 9 U.S.C.M.A. 696, 26 C.M.R. 476 (1958); United States *v.* Cummins, 9 U.S.C.M.A. 669, 26 C.M.R. 449 (1958) (Ferguson dissenting). On occasion, the Court has expressed concern over the severity of sentences, *e.g.* United States *v.* Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955) (Judges Brosman and Latimer strongly recommended clemency for petitioner who had been sentenced to 42 years confinement for 3 burglary offenses, indecent assault, and taking indecent liberties with a female under 16); United States *v.* Marshall, 2 U.S.C.M.A. 54, 6 C.M.R. 54 (1952) (Court opined that the death penalty was inappropriate for the rape conviction it found legally sufficient).

[266] Adamkewicz, *Appellate Consideration of Matters Outside the Record of Trial*, 32 MIL. L. REV. 1 (1966).

[267] *E.g.*, United States *v.* Carey, 11 U.S.C.M.A. 443, 29 C.M.R. 259 (1960); United States *v.* Burns, 2 U.S.C.M.A. 400, 9 C.M.R. 30 (1953).

[268] *E.g.*, United States *v.* Care, 18 U.S.C.M.A. 535, 30 C.M.R. 247 (1969); United States *v.* Williams, 15 U.S.C.M.A. 65, 35 C.M.R. 37 (1964).

[269] *E.g.*, United States *v.* Huff, 11 U.S.C.M.A. 397, 29 C.M.R. 213 (1960); United States *v.* Allen, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957).

[270] If the staff judge advocate's advice is "erroneous, inadequate, or mis-

mand influence [271] can be raised for the first time on appeal. Perhaps the most striking power assumed by the Court of Military Appeals was the capacity to issue writs in aid of its jurisdiction [272] although this power has been of limited usefulness.[273] These assumed inherent powers not only manifest the judicial activism of the Court of Military Appeals but also indicate certain structual deficiencies in military justice.

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leading, the substantial rights of an accused may be affected." United States *v.* Rivera, 20 U.S.C.M.A. 6, 7, 42 C.M.R. 198, 199 (1970) and cases cited therein.

[271] United States *v.* Shepherd, 9 U.S.C.M.A. 90, 25 C.M.R. 352 (1958); United States *v.* Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1958); United States *v.* Ferguson, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954). In 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), the court *established* a procedure for determining allegations of command influence.

[272] In United States *v.* Frischkolz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966), the Court declared itself a "court of the United States" within the ambit of the All Writs Act, 28 U.S.C. § 1651(a) (1964). Judge Brosman as early as 1954 had opined that the Court possessed extraordinary powers. United States *v.* Ferguson, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954). On two other occasions the Court, without deciding if it possessed power to act on a writ of coram nobis, dismissed writs after finding no basis for relief. United States *v.* Tavares, 10 U.S.C.M.A. 282, 27 C.M.R. 356 (1959); United States *v.* Buck, 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958). The Army Court of Military Review in United States *v.* Draughon, (ACMR, 20 Mar. 1970), declared that it possessed the power to grant extraordinary relief. For comment on the assumption and utility of the extraordinary writ power, *see* Everett, *Collateral Attack on Courts-Martial Convictions*, 11 A.F. JAG L. REV. 399 (1969); Grafman, *Extraordinary Relief and the United States Court of Military Appeals*, 24 JAG J. 61 (1969); Rankin, *The All Writs Act and the Military Judicial System*, 53 MIL. L. REV. 103 (1971).

[273] ANNUAL REPORT, 1970, at 16, indicates that through June 30, 1970, relief had been granted in only two cases out of 167 that had been assigned numbers on the Miscellaneous Docket of the Court. However, research has produced the following instances in which relief was granted. Maze *v.* United States Army Court of Military Review, 20 U.S.C.M.A. 599, 44 C.M.R. 29 (1971) (en banc decision of the Army Court of Military Review reversed, as United States *v.* Chilcote, 20 U.S.C.M.A. 283, 43 C.M.R. 123 (1971) applied retroactively); Petty *v.* Convening Authority, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971) (Article 32 enjoined because of improper withdrawal of charges from a special court-martial); Collier *v.* United States, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970) (rescission of deferment of confinement held an abuse of discretion where sole reason was a change of commanders); Zamora *v.* Woodson, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970) (general court-martial enjoined because of lack of jurisdiction over civilian in Vietnam); Fleiner *v.* Koch, 19 U.S.C.M.A. 630 (1969) (O'Callahan claim of lack of jurisdiction sustained); Jones *v.* Ignatius, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968) (convening authority's commuting bad conduct discharge adjudged by special court-martial to additional confinement and forfeitures beyond six months held unlawful); United States *v.* Boards of Review, Nos. 2, 1, 4, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967) (request by government granted to vacate Board decisions in order to follow Dubay guidelines for inquiry into command influence).

IV. SUMMARY AND CONCLUSIONS

Since its establishment over 20 years ago the United States Court of Military Appeals has been a positive and powerful force in the administration of military justice. By the protection and expansion of its jurisdiction, the broad construction of prejudicial error, the unhesitant interpretation of the Manual for Courts-Martial, and the assumption of inherent powers, the Court of Military Appeals has supplemented the constitutional powers of the President and Congress in governing, regulating, and disciplining the armed forces. Decision making by the Court has, in the words of the late Judge Brosman, indeed been freer than most tribunals.[274] Although drawing from the full spectrum of legal sources [275] the judges have relied heavily on congressional intent in their decisionmaking process.

> The Court, since its creation in 1951, has been required to interpret the Code and to enforce its provisions according to the intent of Congress. This intent was to establish a complete, fair, and impartial judicial system. It must be noted that the Court in its daily work has never lost sight of this goal.[276]

Unquestionably, the Court of Military Appeals was a revolutionary addition to military justice. A leading contemporary critic of military justice has observed that the Court "only provides a limited remedy for servicemen, but it has accomplished more reform in the field of procedural due process than all the prior congressional codes put together." [277] The Court has brought sophistication, if not civilianization, to the court-martial process.

The efforts of the Court of Military Appeals to upgrade military justice have provoked praise [278] as well as criticism.[279] An

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[274] Brosman, *The Court: Freer Than Most*, 6 VAND. L. REV. 166 (1953).

[275] *See* Zoghby, *Is There A Military Common Law of Crimes*, 27 MIL. L. REV. 75 (1965) (an examination of the sources of law utilized by COMA in homicide, sex crimes, crimes against property and crimes against the person).

[276] 1957 ANNUAL REPORT at 33–34.

[277] SHERMAN, CIVILIANIZATION, at 51.

[278] *See, e.g.*, EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (1956); Fedele, *Appellate Review in the Military Justice System*, 15 FED. BAR J. 399 (1955); Finan and Vorbach, *The Court of Military Appeals and the Bill of Rights: A New Look*, 36 GEO. WASH. L. REV. 435, 446 (1967); Walker, *An Evaluation of the United States Court of Military Appeals*, 48 NW. U. L. REV. 714, 733 (1954); Note, *Servicemen in Civilian Courts*, 76 YALE L. J. 380, 390 (1966).

[279] *See, e.g.*, Avins, *New Light on the Legislative History of Desertion Through Fraudulent Enlistment: The Decline of the United States Court of Military Appeals*, 46 MINN. L. REV. 69 (1961) (the most libelous indictment of COMA attacking not only results but the quality of the Court's work

activist tribunal, its opinions do suffer somewhat from a lack of consistency and may be criticized for being both too coarse and too technical. In view of the traditional command control over military justice and the limited review of courts-martial prior to the Uniform Code of Military Justice it was not surprising that early decisions of the Court were not warmly received within the military establishment. Although it is beyond the scope of this present endeavor to detail fully the conflict between the Court of Military Appeals and its constituents some insight into that conflict is necessary to appreciate the significance of the Court's work. Soon after the effective date of the UCMJ complaints about excessive appellate delays and warnings about the breakdown of military justice in time of war were again sounded.[280]

Military displeasure with the activism and decisions of the Court is evident in annual reports sent to Congress by the Court of Military Appeals and the Judge Advocates General.[281] Disenchantment with specific cases and differences in recommendations to Congress erupted in 1960 with the publication by the Army of the Powell Report.[282] This report not only criticized

product); Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of the Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861 (1959); Note, *Servicemen's Rights*, 64 COLUM. L. REV. 127 (1964) (very critical of Court's usurption of executive and legislative power). Naturally, military legal journals contain comment and analysis of the Court's work. A fair insight into the reaction of military legal practitioners may be obtained from reading *A Symposium on Military Justice, The Uniform Code of Military Justice, 1951–1961*, 12 MIL. L. REV. 1 (1961).

[280] *See, e.g.*, 1954 ANNUAL REPORT at 21–22, 29, 51–55 (reports of the Judge Advocates General); "Scrap Justice Code, Services Urge: Judges Promise a Fight," Navy Times, June 11, 1955. The Judge Advocate General of the Air Force, Major General Harmon, was a most vocal opponent of appellate review under the UCMJ and before a meeting of the Judge Advocates Association on August 17, 1954, critized appellate delay and costs calling for a reinstitution of the Elston Act. Such action would have meant the demise of COMA. Harmon, *Progress Under the Uniform Code*, JUDGE ADVOCATE JOURNAL, October 18, 1954, at 10. For rebuttal to General Harmon, *see* remarks of Judge Latimer reported in *Annual Meeting*, JUDGE ADVOCATE JOURNAL, October 18, 1954, at 3; Shine, *Fallacious Attacks Against the Code*, JUDGE ADVOCATE JOURNAL, July 1955, at 1.

[281] UCMJ art. 67(*g*). See *supra* notes 108, 130, 174.

[282] *See, supra* note 3. This report was a massive study of the problems in the administration of military justice as seen by the "users" of the UCMJ. The Committee was composed of Lieutenant General Powell, Major Generals Bush, Harris, Hickman, Lincoln, Westmoreland, Easley, and Brigadier Generals Hodson and Decker. The report was subsequently endorsed by the Secretary of the Army. The present Army Chief of Staff has recently embraced the philosophy of the Powell Report in Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971). The 1960 Annual Report contained no Joint Report to Congress by COMA and the Judge Advocates General owing to the ideological schism caused by the Powell Report.

specific decisions of the Court of Military Appeals but also sought to change the character of the Court. Remedial legislation was proposed to narrow the concept of prejudicial error, to make the Manual binding on appellate tribunals, and to add two military members to the Court of Military Appeals.[283] Fortunately, Congress enacted few of the Powell Report recommendations [284] and military criticism of the Court has subsided.[285]

This article has been largely descriptive, outlining the power and jurisdiction of the United States Court of Military Appeals and demonstrating the interaction between congressional enactment, executive implementation and judicial decisionmaking. After a turbulent first decade the Court has maintained its role as a prime mover in the development and administration of military justice. The future of the Court is, however, clouded.[286] The Court of Military Appeals may have fully expanded its

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[283] *Id.* at 193–95. The Powell Report was quite blunt in naming cases it thought should be reversed and in portraying its dissatisfaction with the balancing of military necessity and individual rights made by COMA. Among other recommendations the Generals made to create their conception of "an incomparable system of justice" were at 100, to remove the requirement of probable cause from commanders who wished to conduct searches, *contra*, United States *v.* Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1956); at 102, to not make the failure to give article 31 warnings render confessions inadmissible; at 102–03, to make compulsory blood tests, urine tests and production of evidence, *contra*, United States *v.* Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); United States *v.* Jordan, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957); United States *v.* Nowling, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958); at 103–04 to allow the trial counsel (prosecutor) to conduct the pretrial hearing instead of an impartial officer and to permit unsworn statements to be considered at such a hearing, *contra*, United States *v.* Samuels, 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959); at 170, to remove appellate review of guilty plea cases. The Powell Report found COMA "not sufficiently conducive to stable procedures and consistent administration of justice" and recommended two additional members for the Court who were to have at least 15 consecutive years service as a judge advocate or legal specialist and who were to hold 4-year terms without eligibility for reappointment.

[284] It should be noted that the Powell Report did contain some laudable suggestions for improvement in the administration of military justice such as elimination of summary and special courts-martial, increased article 15 powers, institution of a pretrial hearing, a limited provision for trial by judge alone, giving finality to certain law officer rulings, removal of convening authority review of findings, elimination of court-martial jurisdiction over inactive retired members and an increase in time for petition for new trial from 1 to 2 years.

[285] The Court itself noted the decline of criticism in 1965 ANNUAL REPORT, at 11–12. *See also* Quinn, *Criticism and the Law*, 35 MIL. L. REV. 47 (1967).

[286] The recent replacement of the Court's leading liberal and activist, Judge Ferguson, by Judge Robert M. Duncan also makes the future of the Court uncertain. Judge Duncan was born August 24, 1927; B.S., Ohio State University, 1948; LL.B., Ohio State University, 1952; 1952–56, U.S. Army; 1969–71, Justice, Supreme Court of Ohio.

present statutory power and jurisdiction and may have exhausted the post-war congressional mandate to upgrade military justice. The Uniform Code of Military Justice remains the touchstone of military justice and executive rule-making may modify some Court decisions. Further examination of the decisions and structure of the Court may very well reveal a need for revitalizing the United States Court of Military Appeals.

EVIDENCE AND THE ADMINISTRATIVE DISCHARGE BOARD*

By Captain Jack Finney Lane, Jr.**

Increasing controversy has surrounded the military administrative discharge procedures. Opponents of the present system claim that a serviceman can be stigmatized for life as the result of a procedurally unfair hearing. The author examines these procedural and evidentiary challenges in light of presently proposed legislative reform. He concludes that changes are necessary to insure determinations fair to both the military and the individual serviceman.

I. INTRODUCTION

The power to discharge enlisted men has generally been left to the discretion of the Secretary of the service concerned, based on a broad authority granted by Congress.[1] Thus, the law of administrative discharge is found in secretarial regulations[2] limited only by a Department of Defense directive which prescribes uniform minimum service guidelines.[3] The system came under fire when Chief Judge Robert E. Quinn of the Court of Military Appeals stated that he was aware of instances in which the administrative discharge system was being used by the services to circumvent the judicial safeguards of the *Uniform*

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[1] *See* 10 U.S.C. § 1169 (Supp. IV, 1969); Universal Military Training & Service Act, § 4(b), 50 U.S.C. App. § 454(b) (1964).

[2] The current regulatory provisions are found in Army Reg. No. 635-200 (15 Jul. 1966), Army Reg. No. 635-206 (15 Jul. 1966), and Army Reg. No. 635-212 (15 Jul. 1966). Special provisions concerning conscientious objectors are found in Army Reg. No. 635-20 (31 Jul. 1970).

[3] Department of Defense Directive 1332.14 (20 Dec. 1965).

Code of Military Justice.[4] This statement prompted congressional consideration of the administrative discharge during the 1962 military justice hearings [5] and the introduction of legislation by Senator Sam J. Ervin (D–NC) the following year.[6] The Secretary of Defense responded to this concern by issuing a new directive which increased the rights of a serviceman in a discharge proceeding and provided the procedural guidance previously lacking.[7] Further congressional hearings dealing with the rights of servicemen were held in 1966 [8] which resulted in a new and more detailed bill authored by Senator Ervin the next year.[9]

This congressional interest prompted considerable discussion of the administrative discharge system.[10] A Special Committee on Military Justice of the American Bar Association recommended

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[4] United States *v.* Phipps, 12 U.S.C.M.A. 14, 30 C.M.R. 14 (1960). Judge Quinn stated: "I am also aware of circumstances tending to indicate that the undesirable discharge has been used as a substitute for a court-martial, even in deprivation of an accused's rights under the Uniform Code of Military Justice, However, the remedy for this troublesome situation rests in the hands of Congress." *Id.* at 16. Judge Quinn confirmed his opinion during his testimony during the Senate committee hearings in 1962. *Hearings on Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 179 (1962) [hereinafter cited as *1962 Hearings*].

[5] *Id.* at 2.

[6] Senator Ervin's proposals for legislative changes in the discharge system were contained in several of the eighteen bills he introduced concerning military justice. S.2002–19, 88th Cong., Ist Sess. (1963).

[7] *Compare* Department of Defense Directive 1332.14 (20 Dec. 1965) *with* Department of Defense Directive 1332.14 (14 Jan. 1959). The new directive made representation by lawyer-counsel mandatory, with few exceptions, while the previous regulation was very permissive as to the requirement that counsel should be a lawyer. The sections on board procedures, former jeopardy and review action were greatly expanded, with increased limitations placed on commanders.

[8] *Joint Hearings on S.745 (and other bills) Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and the Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess. (1966) [hereinafter cited as *1966 Hearings*].

[9] S.2009, 90th Cong., 1st Sess. (1967), reintroduced with changes as S.2247, 92d Cong., 1st Sess. (1971). Senator Ervin's bill proposes a new chapter to Title 10, United States Code, containing twenty-six sections. The bill would establish an entire statutory discharge system from jurisdiction through final review, with little discretion vested in the Secretary. An identical bill was introduced in the House by Rep. Roman Pucinski (D–Ill.), H.R. 9918, 92d Cong., 1st Sess. (1971).

[10] *See* Lynch, *The Administrative Discharge: Changes Needed?*, 22 MAINE L. REV. 141 (1970); Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L. J. 41; Dougherty and Lynch, *Administrative Discharges: Military Justice?*, 33 GEO. WASH. L. REV. 498 (1964); Powers, *Administrative Due Process in Military Proceedings*, 20 WASH. & LEE L. REV. 1 (1963).

minimum standards in 1968.[11] These recommendations were later used as the basis for "opposition" legislation introduced by Representative Charles E. Bennett (D–Fla.).[12] This bill, like the ABA recommendations, is general in scope and places few limitations on the discretion of the Secretary.[13]

The Ervin bill, with its more specific provisions, provides the best vehicle for discussion of changes in the administrative discharge system. Because the bill covers the entire system, any study in depth must concentrate on only a portion of the bill. Due to the rather serious indictment made against the field board of officers by various witnesses during the congressional hearings,[14] this article will examine the issue of evidence and related problems in the board of officers, drawing upon case law and civilian administrative law parallels for analytical purposes. In making this study, it must be remembered, that the Ervin bill concerns itself solely with the undesirable discharge certificate, the most severe of the administrative discharges.[15] It must

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[11] *Report of the Special Committee on Military Justice*, 93 A.B.A. Rep. 577 (1968). The recommendations included the power to issue process, greater discovery rights, and findings based on a preponderance of the evidence.

[12] H.R. 19697, 90th Cong., 2d Sess. (1968), reintroduced as H.R. 523, 92d Cong., 1st Sess. (1971).

[13] The Bennett bill proposes to amend 10 U.S.C. § 1161 alone, and covers only three pages. The bill follows the ABA committee's philosophy that the detailed provisions in Senator Ervin's bill would constitute an improper invasion of the service secretaries' administrative discretion and that policy guidance alone is needed. 93 A.B.A. Rep. 577, 580 (1968). The Bennett bill adds little to the current DOD directive, except for granting subpoena power to the board of officers and requiring findings based on a preponderance of the evidence.

[14] Several Washington attorneys testified concerning their experiences before discharge boards. Fred W. Shields stated that:

> . . . my own opinion is that the field board of officers serves no really useful purpose. It only divides responsibility for the action taken and presents the appearance of protection. . . .

1962 Hearings 279. Neil Kabatchnick said the system was too loose, and was especially critical of the procedures concerning witnesses, legal advice to the board and the burden of proof. *1966 Hearings* 254.

[15] Discharges were first characterized in 1893 as honorable, without honor and dishonorable; the first two were administrative and the third punitive. A third administrative discharge, labelled "unclassified," was added in 1913, but it and the "without honor" discharge were replaced by the so-called "blue" discharge in 1916. In 1947, at the insistence of the Veteran's Administration, the "blue" discharge was replaced by the general and undesirable discharges, the latter one also being termed as "less than honorable." *See 1962 Hearings* 108 (testimony of Alfred B. Fitt, Deputy Under Secretary of the Army); Offer, *Administrative Discharges—What It's All About*, 25 ARMY DIGEST No. 9 p. 5 (1970). Thus, today, there are three administrative discharges and two punitive discharges, in order as follows:

also be recognized that there is a general feeling that the undesirable discharge carries with it a social and economic stigma. Therefore, it is worthwhile to discuss briefly the nature of this stigma as articulated in court opinions and congressional testimony.

A soldier being discharged from the Army is advised that an undesirable discharge may result in the loss of many or all veteran's benefits and causes substantial prejudice in civilian life.[16] While there has never been an empirical study conducted to determine the exact number of former servicemen who have been denied employment solely because they received an undesirable discharge, the consensus of opinion among witnesses at the congressional hearings was that a "stigma" was attached to this discharge.[17] Major General Kenneth J. Hodson testified that he had no evidence to refute the stigma allegation [18] and one congressman stated that the result of a "little" poll of industry indicated that a man with an undesirable discharge would generally not be granted an interview.[19] Some statistical support for the stigma proposition is found in the records of the Army Discharge Review Board which show 65,853 appeals of undesirable discharges from 1944 through 1970, an average of 2,439 appeals a year.[20]

Judicial opinions in a number of cases involving undesirable discharges have generally conceded that since most soldiers are discharged from the service with an honorable discharge, any-

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honorable, general, undesirable, bad conduct and dishonorable. Army Reg. No. 635–200, para. 1–5 (15 Jul. 1966).

[16] Army Reg. No. 635–206, (15 Jul. 1966); Army Reg. No. 635–212, (15 Jul. 1966).

[17] *1962 Hearings* 5, 315–28, 335–36 (testimony of Senator Kenneth Keating (R–NY), Representative Clyde Doyle (D–Cal.) and Charles H. Mayer). In the Senate report it was stated that the subcommittee had received letters from many ex-servicemen who accepted undesirable discharges without a full understanding of the stigma and now spoke of the difficulty it created in obtaining employment. Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess., Summary Report of Hearings on Constitutional Rights of Military Personnel Pursuant to *S. Res. 58* 2 (1963).

[18] *1966 Hearings* 381 (testimony of Brigadier General Kenneth J. Hodson, Assistant Judge Advocate General.) General Hodson was appointed The Judge Advocate General of the Army in 1967 and promoted to major general.

[19] *1962 Hearings* 315 (testimony of Representative Clyde Doyle (D–Cal.)).

[20] 21 ARMY No. 7 p. 51 col. 2 (1971). It is worthy of note that of the 65,853 appeals, only 9,398, or 14.2 percent resulted in an upgrading of the character of discharge, mostly because of administrative error *Id.*

thing less stigmatizes the ex-serviceman.[21] Because it may mean the loss of many state and federal veteran's benefits, the undesirable discharge has been said to deprive an exserviceman of valuable property rights as well as personal rights.[22] In a recent opinion it was stated:

> There can be no doubt that [an undesirable] discharge . . . is punitive in nature, since it stigmatizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against a serviceman's character, patriotism or loyalty."

Although this language is the most extreme yet used by a court in characterizing the undesirable discharge, it nevertheless is in line with the thought of some that an undesirable discharge is more damaging in civilian life than the judicially adjudged bad conduct discharge. The rationale is that while people may overlook one act of "bad conduct," they are not so prone to overlook "undesirability." [24]

Whatever the degree of the "stigma" which attaches to an undesirable discharge, the military recognizes that it exists and does not feel that it is "manifestly unfair." [25] When the vast majority of servicemen do their jobs and receive honorable discharges, the habitual shirker and deliberate miscreant should not receive the same badge of honor. In fact, it has been stated that it is the military's obligation to distinguish such persons with a "suitably characterized discharge." [26] The proposed legislation is not designed to remove the stigma of an undesirable dis-

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[21] Bland *v.* Connally, 293 F. 2d 852 (D.C. Cir. 1961); Unglesby *v.* Zinmy, 250 F. Supp. 714, 716 (N.D. Cal. 1965); Conn *v.* United States, 376 F. 2d 878, 881 (Ct. Cl. 1967); Sefranoff *v.* United States, 165 Ct. Cl. 470 (1964); Clackum *v.* United States, 148 Ct. Cl. 404 (1960). The language in some of the cases is broad enough to include the general discharge as well as the undesirable discharge, but the real concern has been directed solely at the undesirable discharge.

[22] Bland *v.* Connally, 293 F. 2d 852 (D.C. Cir. 1961); Berstein *v.* Herren, 136 F. Supp. 493 (S.D.N.Y. 1956); United States *v.* Keating, 121 F. Supp. 477 (N.D. Cal. 1949).

[23] Stapp *v. Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970).

[24] *1962 Hearings* 188 (testimony of Robert E. Quinn, Chief Judge of the Court of Military Appeals). Not many people outside the military realize that the bad conduct discharge is the result of a criminal conviction. The natural tendency is to suppose that a man found undesirable by the military is also undesirable for civilian society, while bad conduct is only a one-time mistake. *Id.* at 328 (testimony of Representative Clyde Doyle (D–Cal.)).

[25] *Id.* at 10 (testimony of Carlisle P. Runge, Assistant Secretary of Defense (Manpower)).

[26] *1966 Hearings* 12–13 (testimony of Thomas D. Mann, Assistant Secretary of Defense (Manpower)).

charge [27] but rather to insure that it is imposed only after a full, fair and legally acceptable hearing. It is the lattter goal with which this article will deal in examining evidence and the administrative discharge board.

II. THE RULES OF EVIDENCE

A. *EVIDENCE IN ADMINISTRATIVE LAW*

The judicial rules of evidence generally are not applied in administrative proceedings.[28] Consideration of the philosophy which underlies this practice will assist in approaching the issue of whether discharge proceedings should be treated as purely administrative actions [29] or should have greater evidentiary restrictions.

Historically, administrative agencies were created for the purpose of bringing technical expertise to specific problems, to experiment in areas of social and economic change, and to resolve complex regulatory problems through negotiation and compromise of competing interests. These agencies were designed both to serve the public interest and to decide cases between litigants.

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[27] Senator Ervin called the honorable discharge the greatest award, in one sense, that a serviceman can obtain and equated it to the Medal of Honor. *Id.* at 380. Senator Strom Thurmond (R–S.C.) applauded the policy that a man earns the reward he receives. *Id.* at 388. Thus, it appears that the subcommittee is not trying to guarantee an honorable discharge for every serviceman, but to insure that an undesirable discharge is given only to those who really deserve it.

[28] Any oral or documentary evidence may be received unless irrelevant, immaterial or unduly repetitious. 5 U.S.C. § 556(d) (Supp. IV 1969). The same criteria is used by the Federal Trade Commission and the Federal Maritime Administration. 16 C.F.R. § 3.43(b) (1970); 46 C.F.R. § 502.156 (1970). The debates on the Administrative Procedure Act show that the Congressional intent was to free agencies from the common law rules of evidence, but it is erroneous to suppose that they meant for no rules to apply. It would be an abuse of administrative procedure to accept remote hearsay or unreliable evidence. DAVEY, FEDERAL ADMINISTRATIVE LAW 85 (1952).

The Federal Power Commission adds the provision that evidence which would not affect reasonable and fair-minded men in the conduct of daily affairs shall be excluded. 18 C.F.R. § 1.26(a) (1970). California provides that administrative agencies may accept evidence "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." CAL. GOV. CODE ANN. § 11513(c) (West, 1955).

See DAVIS, ADMINISTRATIVE LAW 447–73 (1951); I WIGMORE, EVIDENCE § 4 a-b (3d ed. 1940); Cooper, *Should Administrative Hearing Procedures Be Less Fair Than Criminal Trials?*, 53 A.B.A.J. 237 (1967).

[29] Under the current practice, discharge boards "are administrative and not judicial in nature. . . . [and a] board of officers is not bound by the rules of evidence prescribed for trials. . . ." Army Reg. No. 15–6, para 10 (12 Aug. 1966).

To perform the former task, agencies were to keep open all channels for the reception of relevant data which could contribute to informed results.[30] The traditional jury-trial rules of evidence, being mainly rules of exclusion, were seen as a hinderance to the fulfillment of the agencies' purpose.[31]

The rationale for dispensing with the jury-trial rules in administrative proceedings is two-fold. First, the agency officials, because of their expertise, have the ability to make a careful inquiry into a problem and to weigh critically the information they find. Strict rules of evidence, therefore, are not needed since they are designed to exclude as much incompetent evidence as possible from the deliberations of an inexperienced jury.[32] The second rationale is that due to the limited subject mattter of agency actions, expertise could be built up quickly and in great depth. By contrast a jury, sitting for a limited number of cases of all types, is not able to develop this expertise and so must be carefully guided in their decision making by only the best evidence.[33]

The military discharge board, while termed an administrative proceeding,[34] differs from the average agency in both of the above mentioned characteristics. The members are not chosen because of any specific expertise in the matter to be decided, but only because they are unbiased officers with experience and maturity.[35] They are also rarely a permanent board, but are appointed to decide one or more pending cases, and thus do not have the opportunity to gain any indepth expertise.[36] Thus, the discharge board members appear more analogous to a jury than to an administrative agency. This conclusion is important in any dis-

[30] Att'y Gen., Final Report of the Committee on Administrative Procedure 70 (1941).

[31] *See* ICC *v.* Baird, 194 U.S. 25 (1904) (discussion of rationale for greater laxity in admission of evidence in administrative agencies).

[32] Turner, *Administrative Evidence*, 4 ALBERTA L. REV. 373 (1966).

[33] To those who contend that the jury-trial system of evidence is the only safe way to insure a proper verdict, Professor Wigmore states that it is obvious to all practitioners that there is no necessary relation between the rules and a correct verdict. I WIGMORE, EVIDENCE § 4b (II) (B) 4 (3d ed. 1940).

[34] Army Reg. No. 15–6, para 10 (12 Aug. 1966).

[35] Army Reg. No. 635–206, para 10*a* (1) (15 Jul. 1966); Army Reg. No. 635–212, para 17*a*(1), (2) (15 Jul. 1966). The considerations for board membership are not in the nature of expertise considerations which might, for example, be used in appointing Edward Teller to the Atomic Energy Commission.

[36] Although the Army's policy *is* to establish permanent boards, Army Reg. No. 635–212, para 17*b* (15 Jul. 1966), it has been the author's experience that this policy is not strictly adhered to.

cussion relating to the creation of evidentiary rules for military boards because it indicates the weakness in relying solely on the "expertise" of the board members.

B. *PROPOSED EVIDENTIARY RESTRICTIONS.*

Senator Ervin's bill provides that the Secretary of Defense shall prescribe rules of evidence for discharge boards, with the restriction that the evidence admitted must be relevant, material and probative.[37] Except for the addition of the word "probative," this is the same as the present rule.[38] The bill also prohibits four specific uses of certain evidence regardless of its relevance, materiality or probative value.[39]

The first prohibition bars evidence of acts or omissions which occurred more than three years prior to the appointing order or prior to the current enlistment, whichever period is longer.[40] One writer concluded that this rule would be too restrictive and would result in a denial of the board's "right" to consider the respondent's whole military record.[41] Analysis of this provision, however, indicates that the limitations would not be unreasonable.

The section would prescribe two cut-off dates in the collection of evidence upon which to base a discharge—the date of the current enlistment or three years prior to the board's appointment. The practical effect of these two limitations can be illustrated by examining several factual situations. A soldier's first enlistment is for either two or three years. A board considering him for discharge before the end of this enlistment could consider preservice activities. The later the board came within this enlistment, the shorter the preservice time that could be considered. If the soldier was in his second or later enlistment, the board would not be prohibited from looking into some portion of his prior enlistment until three years had passed in his current enlistment. Finally, if the later enlistment was for more than three years, the board could look at that entire enlistment period regardless of the three year limitation.

Several facts combine to show that this rule would not be

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[37] S. 2247, 92d Cong., 1st Sess. § 950(b), 959 (d) (1971).
[38] Army Reg. No. 15–6, para 10 (12 Aug. 1966).
[39] S. 2247, 92d Cong., 1st Sess. § 959 (a), (c)–(d), 960(a) (1971).
[40] One exception is allowed for cases of fraudulent enlistment and is limited to specific acts or omissions occurring in the immediately proceeding enlistment which show that the current enlistment is based on a material misrepresentation or fraud. *Id.* at 959(b).
[41] Lynch, *supra* note 10, at 163–64.

"too" restrictive. A soldier's enlistment can be looked upon as a contract for a term of years with his discharge certificate as a formal, final judgment on his military service, based solely on the record of that period of service.[42] Thus, it can be argued that once an enlistment is terminated, acts committed during that period should not be used at a later date for a board action. Another fact is that in courts-martial the admission into evidence of prior nonjudicial punishments and convictions for sentencing purposes is limited to a maximum of two years and six years respectively.[43] Finally, a search by the board for evidence over three years old should not be necessary if the discharge regulation is being properly followed. The grounds for discharge require proof of either a pattern of conduct,[44] a present condition [45] or a specific act.[46] Evidence of several widely separated similar acts presents a weak case for arguing a pattern of conduct. If there are not sufficient acts or omissions within the last three years, the government has not lost a good case by being foreclosed from using a greater time period. If discharge is contemplated for a condition or act occurring more than three years previous, the collection of adequate proof would probably be difficult and very time-consuming. More importantly, the respondent could well find himself at a disadvantage in obtaining witnesses and evidence with which to establish his defense. In essence, Senator Ervin's bill would create a statute of limitations similar to that found in the *Uniform Code of Military Justice*.[47] This provision, while new to the discharge system, is neither unique nor unfair to either party.

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[42] Bernstein *v.* Herren, 136 F. Supp. 493 (S.D.N.Y. 1956). The type and character of discharge will be determined solely by the member's military record during that enlistment and any extension thereof. Preservice or prior service activities will not be considered. Army Reg. No. 635–200, paras 1–7, 1–9 (15 Jul. 1966). The Supreme Court has held that under the discharge statutes the type of discharge to be issued is to be solely determined by the soldier's military record. Harmon *v.* Brucker, 355 U.S. 579 (1958).

[43] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED), para 75*b*, [hereafter cited as MCM 1969 (REV.)]; Army Reg. No. 27–10, para 2–20*b* (Change No. 3, 27 May 1969).

[44] Among these are frequent discreditable incidents, pattern of shirking, pattern of nonsupport and pattern of indebtedness. Army Reg. No. 635–212, para 6*a* (15 Jul. 1966).

[45] Among these are sexual perversion, inaptitude, behavior disorder, apathy, alcoholism, enuresis and homosexuality. Army Reg. No. 635–212, para 6*a–b* (15 Jul. 1966).

[46] Among these are unauthorized absence, civil conviction and fraudulent entry. Army Reg. No. 635–206 (15 Jul. 1966); Army Reg. No. 635–212, para 6*a* (Change No. 7, 28 Nov. 1969).

[47] The court-martial statute of limitation varies from two to three years. UNIFORM CODE OF MILITARY JUSTICE, Art. 43.

The second evidentary limitation of the Ervin bill is similar to the first, providing that the character of a discharge shall be based solely on a member's military record during his current enlistment. This provision is almost identical to the Army's enlisted separation regulation [48] and is in keeping with judicial decisions that a discharge is characterized on a man's military record alone.[49] Thus, this section does not change existing procedures.

The third prohibition excludes evidence which relates to acts of which the respondent has been acquitted or for which he cannot be retried by reason of former jeopardy. The present regulation for discharge boards provides that the Department of the Army may grant an exception to the rule of double jeopardy in limited cases.[50] Thus, a serviceman can be subjected to continuing sanction for the same misconduct. The proposed provision is certainly meritorious in foreclosing all administrative actions once judicial action has been taken against the individual.

The last proscription is threefold and states first that all adverse information will be excluded from admission into evidence if the respondent has not had the opportunity to cross-examine the informer. While this limitation has been praised as "worthwhile," [51] the complete exclusion of information without cross-examination raises a serious question as to the use of hearsay evidence, even under the judicially recognized excep-

[48] Army Reg. No. 635–200, para 1–7 (Change No. 1, 1 Jun. 1967).

[49] Harmon *v.* Brucker, 355 U.S. 579 (1958).

[50] The regulation provides that:

> "No member will be considered for administrative discharge because of conduct which has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof. The determination whether an action has the effect of an acquittal will be determined solely by Headquarters, Department of the Army, . . ."

Army Reg. No. 635–200, para 1–13*a*(1) (Change No. 18, 3 Apr. 1970). The regulation further prohibits action on conduct which has previously been before an administrative board which has recommended retention of the serviceman. Army Reg. No. 635–200, para 1–13*a*(2) (Change No. 18, 3 Apr. 1970). Finally, the regulation prohibits consideration for an administrative discharge "because of conduct which was considered by a general or special court-martial if . . . a punitive discharge was authorized . . . but was not adjudged, or was disapproved or suspended . . . ." However, an exception may be granted in this latter instance "due to the unusual circumstances of the case, . . ." Army Reg. No. 635–200, paras 1–13*a*(3), 1–13*b*(3) (Change No. 18, 3 Apr. 1970).

These provisions in the regulation were the subject of extensive discussion during the last congressional hearings and seemed to arouse considerable concern among the subcommittee members. *1966 Hearings* 398–401.

[51] Lynch, *supra* note 10, at 164. The writer does not state why he believes this section could be worthwhile.

tions. Hearsay evidence is commonly used in administrative proceedings on the ground that the administrators' expertise is a sufficient safeguard against its misuse,[52] a situation not necessarily present in a discharge board proceeding.[53]

There are several ways to approach the use of hearsay evidence at board hearings, but none of them is entirely satisfactory. To allow the introduction of all hearsay at a board hearing can have the unfavorable effect of inducing the government to ignore in spirit the policy that the personal appearance of witnesses is to be obtained whenever possible.[54] This could be particularly true if the witness is of doubtful credibility. The other extreme is to exclude all hearsay, which is the effect of Senator Ervin's proposal. This could place the government at a disadvantage if it has a statement but is unable to locate the witness or compel his attendance because he has left the service.[55] Also, if he dies subsequent to his statement, the government would lose his testimony altogether. Thus, the incentive could be for the respondent to delay in the hope of having the government's witnesses become unavailable. A middle ground is to adopt the court-martial hearsay rule, with all its complex exceptions.[56] This alternative would probably necessitate the presence of a legally trained officer to either advise the board members or rule on hearsay questions himself. It would also create delays in preparing for the proceedings and lengthen the hearing by adding more tactical manuevers by both parties. The government might find it necessary to insure that it is represented by legally qualified counsel which would seriously tax the military's limited legal manpower. Thus, the use of jury-trial rules would hamper prompt administrative action.

A possible solution to the problem of hearsay evidence is found in the California administrative procedures which allow for the use of hearsay, but not as the sole basis for a decision.[57] A similar New York rule requires a "residuum of legal evidence"

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[52] Note, *Hearsay Under the Administrative Procedure Act*, 15 HASTINGS L. J. 369 (1964).

[53] *See* text accompanying notes 35–37, *supra*.

[54] Army Reg. No. 15–6, para 13*b* (12 Aug. 1966).

[55] The government is powerless to retain a man beyond the expiration of his enlistment to be a witness at a board hearing without his consent. If he demands his release, he has a right to be discharged. *See* United States *v.* Hout, 19 U.S.C.M.A. 299, 41 C.M.R. 299 (1970).

[56] MCM 1969 (REV.), paras 139–146.

[57] "Hearsay evidence may be used . . . but shall not be sufficient in itself to support a finding. . . ." CAL. GOV. CODE ANN. § 11513(c) (West 1955).

to support an administrative decision.[58] The "residuum" must be evidence which could be admitted before a court in a civil action and thus may include hearsay which comes within one of the recognized exceptions. Such a rule in the military would allow the board to receive evidence of all types. The resolution of the "residuum" would come upon review by the appointing authority. At the same time, it would create a requirement on the quantum of evidence necessary for a decision which would afford the respondent greater protection.

The remainder of the prohibition in this section excludes investigative reports when the investigator who gathered the information is not present for cross-examination and excludes all classified information which has not been released to the respondent. This provision is of particular importance because several courts have overruled decisions in favor of the government when it used "secret" evidence.[59] In one case the government had offered nothing more than a "certificate" summary of an investigative report, refusing to release the whole report on the grounds that it was classified.[60] In *Greene* v. *McElroy*,[61] the Supreme Court reversed a security clearance revocation because it was based entirely upon confidential information in the hands of the review board and not disclosed to the appellant. The Court stated that absent any explicit executive or congressional authority, this nondisclosure was a violation of due process.

Another possible basis for nondisclosure is that of inherent authority, which was the ground for upholding a regulation allowing for the exclusion of a civilian from a naval installation

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[58] Carroll *v.* Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916). The residuum rule has been attacked as indirectly imposing the technical rules of evidence on administrative agencies. Turner, *supra* note 32, at 378–79.

[59] Greene *v.* McElroy, 360 U.S. 474 (1959) (revocation of security clearance); Vitarelli *v.* Seaton, 359 U.S. 535 (1959) (dismissal for security reasons); Bland *v.* Connally, 293 F.2d 852 (D.C. Cir. 1961) (discharge of inactive reservist for alleged subversive activity); Glidden *v.* United States, 185 Ct. Cl. 515 (1968) (undesirable discharge for fellatio); Fletcher *v.* United States, 183 Ct. Cl. 1 (1968) (dismissal of postal employee); Clackum *v.* United States, 148 Ct. Cl. 404 (1960) (discharge "under conditions other than honorable" for homosexuality). *Contra*, Van Bourge *v.* Nitze, 388 F. 2d 557 (D.C. Cir. 1967) (ONI reports held secret due to classification in disloyality discharge action); Bailey *v.* Richardson, 182 F. 2d 46 (D.C. Cir. 1950), *aff'd by equally divided ct.*, 341 U.S. 918 (1951) (recognized executive order requiring secrecy of reports).

[60] Glidden *v.* United States, 185 Ct. Cl. 515 (1968).

[61] 360 U.S. 474 (1959). Greene was a defense contractor employee who lost his job when his security clearance was revoked. It appears that the board never questioned any of the confidential informers.

without any hearing at all.[62] Since it has never been argued that the Secretary has the inherent power to discharge serviceman,[63] the administrative discharge process falls within the principle of *Greene*. While no statute or executive order exists which allows for nondisclosure of adverse confidential information in a discharge case, Senator Ervin's bill would remove any doubt as to the application of *Greene* to the military. This is definitely to the benefit of the respondent as it broadens the scope of his discovery of adverse evidence and allows him to fully defend himself at a board hearing. Absent some compelling reason of national security, disclosure of "secret" evidence should, in all fairness, be the rule.

C. *DOCUMENTARY EVIDENCE.*

The admission of official records, business entries and authenticated writings is a recognized exception to the judicial hearsay rule.[64] In administrative law, however, documents have been admitted in evidence, without regard to the hearsay rule, as long as the matters contained therein were relevant, material and not repititous.[65] This same rule is found in the Army's procedural regulation, which allows for the admission of records, documents, and other wiritngs.[66] This regulation, however, does not make any demand on the board to judge the credibility or authenticity of the documents offered as evidence.

The problem caused by the undiscriminating consideration of

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[62] Cafeteria & Restaurant Workers' Union *v.* McElroy, 367 U.S. 886 (1961). The Court was also influenced by the fact that the exclusion had no effect on the civilian's ability to pursue her profession, but only precluded her from working on this one installation. Thus, this case can be distinguished from Greene on two grounds, *i.e.*, the underlying authority for the regulation and the extent of the harm to the individual.

[63] *See* U.S. DEP'T OF ARMY, PAMPHLET NO. 27-187, MILITARY AFFAIRS 69-70 (1966).

[64] *See* V WIGMORE, EVIDENCE §§ 1517-61, 1630-84 (3d ed. 1940); MCM 1969 (REV.), paras 140-46. Business entries are admissible if made in the regular course of business by one with knowledge or reliable information of an event, and made soon after the event. An official record is admissible if made pursuant to some duty to record by a public official and made upon first-hand knowledge or reliable report.

[65] 5 U.S.C. § 556(d) (Supp IV 1969). The Federal Power Commission, for example, makes no other limitations as to documents. 18 C.F.R. § 1.26 (1970). The Federal Trade Commisson goes only so far as to exclude irrelevant portions of offered documents. 16 C.F.R. § 3.43(b) (1970). The Federal Maritime Commission has the same basic rule, but in rulemaking proceedings will exclude properly verified documents if a party objects to the absence of the maker thereof for cross-examination. 46 C.F.R. § 502.157(b) (1970).

[66] Army Reg. No. 15-6, para 9*a* (12 Aug. 1966).

all documents offered can be illustrated by an example from the author's experience at Fort Riley, Kansas. The majority of discharge case files prepared at that post contained an "identification record" prepared by the Federal Bureau of Investigation. This record, based on fingerprint cards submitted by local police agencies, contained arrest data which the military was then using in its discharge cases to show frequent incidents of a discreditable nature with civil authorities and general bad character. The information on the "record," however, had been recorded as received by the Bureau without verification,[67] and was not authenticated by a Bureau official. The use of this unverified, unsupported "record" is unfair to a respondent because he is thereby forced to defend himself by credible evidence to the contrary.[68]

The obvious answer to such a situation is to place a limitation on the quality of documentary evidence to be received by the board. A reasonable limitation would be to allow the admission of properly authenticated documents, official records and business entries with the same rules now applied in judicial proceedings. In many cases the respondent would be willing to stipulate to these documents, as is currently done in courts-martial, and the board hearing could proceed promptly and without numerous objections to be argued.

D. *CONSTITUTIONALLY PROSCRIBED EVIDENCE.*

In 1966 a federal district court reviewed the proceedings of a board of officers and held that certain evidence presented to the board was inadmissible because it was obtained by an unreasonable search.[69] In reaching this conclusion, the court made no distinction between administrative and judicial proceedings, nor did it discuss the rules of admissibility found in Army

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[67] Letter from J. Edgar Hoover, Director, FBI, to the author, Oct. 27, 1970. Mr. Hoover cites 28 U.S.C. § 534 (1964) as authority for this function of the Bureau.

[68] The danger in using this record at a board proceeding can be seen in a hypothetical. Assume that a spiteful neighbor makes a complaint about John Doe's party next door and Doe is arrested for drunk and disorderly conduct. He is "booked and printed" and the fingerprint card sent to the FBI with the note "Charge: drunk and disorderly." Later, the complaint is withdrawn for lack of evidence, but, being busy, the police do not follow up on the fingerprints sent to the FBI. Now, two years later, the FBI identification record is introduced at a board hearing to established a pattern of incidents with civil authority, i.e., drunk and disorderly conduct, or to rebut Doe's testimony of good character.

[69] Crawford *v.* Davis, 249 F. Supp. 943 (E.D. Pa), *cert. denied*, 383 U.S. 921 (1966).

regulations. The decision was based, instead, on the rules applied in criminal cases, including courts-martial. The court also discussed the mattter of a subsequent confession and the warning requirements of *Article 31*,[70] and again made no reference to the administrative character of the proceedings. Thus, this case gives impetus for an inquiry into the application of certain constitutional standards in discharge board proceedings.

A recent article on the administrative discharge system recommends that "constitutional and statutory guarantees and protections" be observed in the collection and admission of evidence for discharge boards.[71] The deficiency of this proposal is that it is not specific as to what guarantees are needed. The result could be that the hearing could become increasingly complex with an abundance of technical rules of evidence. Therefore, consideration should be limited to two major constitutional problems—searches and self-incrimination.

Although the fourth amendment is of general application,[72] until recently there was a reluctance to apply its provisions to the administrative area with the same degree of force found in the criminal area.[73] In *Camara* v. *Municipal Court*,[74] however, the Supreme Court settled the issue by stating that the amendment is meant to safeguard the privacy and security of individuals against arbitrary invasions by government officials and that it is anomalous to limit its application to cases where an individual is suspected of a criminal offense. The Court refused to accept the argument that the public interest demanded the need for warrantless "administrative" searches. Thus, the Court has applied the prohibition against unreasonable searches to the administrative arena. It is necessary now to insure that there is no doubt that this same principle applies to the administrative discharge.[75]

The fifth amendment's ban on compelling self-incrimination presents an entirely different problem because the amendment

[70] UNIFORM CODE OF MILITARY JUSTICE, Art. 31.

[71] Lynch, *supra* note 10, at 161.

[72] "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend IV. At no time does the amendment refer to criminal cases as a limiting factor in the application of its protections.

[73] *Compare* Frank *v.* Maryland, 359 U.S. 360 (1959) *and* Eaton *v.* Price, 364 U.S. 263 (1960) *with* Camara *v.* Municipal Court, 387 U.S. 523 (1967) (overruling the *Frank* decision).

[74] 387 U.S. 523 (1967).

[75] *See* United States *v.* Welch, 19 U.S.C.M.A. 134, 136, 41 C.M.R. 134, 136 (1969). The Court of Military Appeals inferred that the *Camara* holding was applicable to the military.

is specifically applicable to "any criminal case." [76] The same limitation is found in *Article 31* which concerns admissibility in a court-martial only.[77] In, several advisory opinions, The Judge Advocate General of the Army has upheld the use in board proceedings of statements obtained in violation of the article.[78] The courts have also held that the fifth amendment does not apply to an administrative proceeding.[79] The result is that an action which is considered illegal before a court-martial is accepted before a board of officers,[80] avoiding what should be the ultimate purpose of the fifth amendment prohibition which is not that evidence illegally acquired is not to be used in court, but that it is not to be used at all.[81] This situation is a good example of the use of discharge boards to circumvent judicial safeguards.[82] A prohibition against the admission at board hearings of self-incriminating statements obtained in violation of the fifth amendment or *Article 31* would bring the discharge system into compliance with an important basic constitutional precept.

III. RIGHT TO OBTAIN EVIDENCE

A. *CONFRONTATION AND CROSS-EXAMINATION.*

The sixth amendment guarantees the criminal defendant the right to confront the witnesses against him and to have com-

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[76] U.S. CONST. amend. V.

[77] UNIFORM CODE OF MILITARY JUSTICE ART. 31.

[78] JAGA 1963/4046, 1 May 1963; JAGA 1962/4208, 16 Jul. 1962; JAGA 1962/3601, 2 Apr. 1962; JAGA 1960/4162, 26 May 1960; JAGA 1956/1098, 20 Jan. 1956. There is one opinion stating that the requirements of Miranda *v.* Arizona, 384 U.S. 436 (1966), are not applicable to discharge board proceedings, noting that there was no decision at that time as to Miranda's application to the military. JAGA 1967/3727, 31 Mar. 1967.

[79] Unglesby *v.* Zimmy, 250 F. Supp. 714 (N.D. Cal. 1965) (5th and 6th Amendment complaints not sufficient as administrative machinery based on grant of legislative authority); Grant *v.* United States, 162 Ct. Cl. 600 (1963) (5th and 6th Amendments not applicable where no criminal charge).

[80] This point is analogous to that made by the dissenting judge in Sackler *v.* Sackler, 16 App. Div. 2d 423, 299 N.Y.S. 2d 61 (Sup. Ct. 1962). The majority allowed evidence secured in a forced entry of the wife's apartment by the husband in a divorce action, citing Burdean *v.* McDowell, 256 U.S. 465 (1921).

[81] By analogy, this argument is similar to the rationale underlying the "fruit of the poisonous tree" doctrine. Silverthorne Lumber Co. *v.* United States, 251 U.S. 385, 392 (1920). In extending this doctrine against proper evidence derived from illegal evidence to wire tap cases, the Supreme Court said that "To forbid the direct use of methods . . . but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'." Nardone *v.* United States, 308 U.S. 338, 340 (1939).

[82] *See* discussion at note 4, *supra*.

pulsory process for obtaining witnesses in his favor.[83] The respondent in an administrative proceeding, on the other hand, has only whatever subpoena and deposition rights that a particular statute or regulation may grant.[84] Recent developments, however, indicate that the right to confrontation in administrative proceedings may depend more on the relationship of the individual to the agency and not merely on the agency rules.[85]

In *Greene* v. *McElroy*,[86] a Personnel Security Board case, the Supreme Court stated there is an "immutable principle" that when the government takes any action involving fact-finding which seriously affects an individual, it must disclose the evidence supporting its facts to the individual and allow him the opportunity for cross-examination. In a subsequent decision the Court appeared to go the other way when it refused to require confrontation and cross-examination in a case involving investigations of the Civil Rights Commission.[87] In this latter case, however, the Court was careful to distinguish between an agency which merely investigates and advises (the Civil Rights Commission) and an agency which makes an adjudication affecting legal rights (the Army–Navy–Air Force Personnel Security Board).[88] Thus, the Court appeared to place the emphasis on the

[83] U.S. CONST. amend. VI. This amendment provides, in part, that: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

[84] The federal administrative regulations, for example, provide for subpoenas as authorized by law for the specific agency. 5 U.S.C. § 555(d) (Supp IV 1969).

[85] Note, *Confrontation and Cross-Examination in Executive Investigations*, 56 VA. L. REV. 487 (1970). The note states that the Supreme Court has been taking a broader view, finding that impaired reputation and economic injury are constitutionally recognized harms. Thus, when a defendant can show that an investigation will focus on him in a way that threatens such harm, he should have the right of confrontation and cross-examination. A military discharge board respondent would have little difficulty making this showing. *See* discussion accompanying notes 16–27, *supra*.

[86] 360 U.S. 474 (1959). At the government review board hearing no witnesses were presented, although the questions asked by the board showed its use of confidential reports.

[87] Hannah *v.* Larche, 363 U.S. 420 (1960). The Commission on Civil Rights had the power to investigate allegations of discrimination and report its findings to the President and Congress. The Court found that the Commission did not make adjudications, did not hold trials or determine any legal liability and did not issue orders, indictments or punishments, and thus its procedure was not a violation of due process. *Id.* at 440–41.

[88] *Id.*, at 442. The Court quoted Justice Cardozo's opinion that "Whatever the appropriate label, the kind of order that emerges from a hearing . . . is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises." *Id.* at 450 *cites* Norwegian Nitrogen Prod. Co. *v.* United States, 288 U.S. 294, 318 (1933).

relation of the agency to the individual and the harm done to him. Then, in *Jenkins* v. *McKeithen*,[89] the Court removed any doubt by stating that when "the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process *requires* . . . the right to confront and cross-examine the witnesses against him." [90] The Commission in question, however, had no authority to make binding adjudications; rather, it made recommendations as to possible action against certain individuals for violations of labor laws. While a military discharge board does not recommend criminal action, its recommendation to the appointing authority that a serviceman be discharged as undesirable has a serious effect on his future and thus should fall within the purview of the *Jenkins* rationale.

In reviewing a military discharge case, one district court offered the advice that "it would be a better practice for the military to require the presence of witnesses at administrative discharge hearings." [91] In *Bland* v. *Connally*,[92] a circuit court stated that the stigma attached to an undesirable discharge was a sufficient reason for giving the respondent an opportunity to confront the witnesses against him.

In all of these decisions where the sixth amendment was considered, the courts have also been presented with the issue

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The distinction, therefore, is not one concerned with the type of agency involved but rather the result of its action on an individual.

[89] 395 U.S. 411 (1969). This case involved the Louisiana Labor-Management Commission of Inquiry, whose principle duty was to investigate and find facts relating to violations or possible violations of state or federal labor law. The commission was appointed by the governor and acted only upon cases referred to it by him.

[90] *Id* at 429 (Emphasis added). The Court distinguished this case from *Hannah* in that the commission performed a function much akin to an official adjudication of criminal culpability. It could also be that *Jenkins*, *Greene* and *Hannah* can be reconciled on a balancing theory, which again goes to the nature and extent of harm to an individual, not the label of the commission. *See* Note, *supra* note 85. In Williams *v.* Zuckert, 371 U.S. 531 (1963), the appellant was held to have lost confrontation rights by waiting too long to call witnesses for cross-examination. Dissenting from the majority opinion in this case, Justices Black and Douglas stated they would hold that there is a constitutional right to cross-examination because of the stigma of discharge, relying on the *Greene* rationale.

[91] Unglesby *v.* Zimmy, 250 F. Supp. 714, 719 (N.D. Cal. 1965). In Fletcher *v.* United States, 183 Ct. Cl. 1 (1968), a Post Office case, it was stated that while the respondent did not have to request witnesses he desired to cross-examine, the government had to show some necessity in using only the affidavits of such witnesses.

[92] 293 F.2d 852 (D.C. Cir. 1961). The trend is away from fundamental fairness in general and more toward specific rights. *See* Glidden *v.* United States, 185 Ct. Cl. 515 (1968).

of "secret" evidence upon which they decided the cases.[93] Thus, no case has been reversed purely because a respondent was denied the right of confrontation. With the Supreme Court's decision in *Jenkins*, however, it is now possible that a court faced with a military discharge case where the sole issue was a lack of sixth amendment confrontation would reverse the discharge. This possibility makes it imperative that serious consideration be given to the use of subpoenas and depositions in board hearings.

B. *SUBPOENA POWERS.*

Most administrative agencies presently allow a generally unlimited subpoena practice,[94] and the federal courts place no restrictions on the granting of subpoenas, except that an "indigent" criminal defendant is required to show that the subpoena is necessary for an adequate defense.[95] In the military court-martial a subpoena must be based upon a showing that the witness is material and necessary.[96] Once the subpoena is granted, the attendance of the witness is a right of the defendant and he cannot

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[93] Bland *v.* Connally, 293 F.2d 852 (D.C. Cir. 1961) (discharge under other than honorable conditions of inactive reserve officer for alleged subversive activity); Glidden *v.* United States, 185 Ct. Cl. 515 (1968) (undesirable discharge for fellatio); Clackum *v.* United States, 148 Ct. Cl. 404 (1960) (discharge for homosexuality). In all three cases, there was no evidence presented to the respondent by the government for rebuttal or witnesses for cross-examination. In *Glidden*, the respondent was "fortunate" enough to get a summary of the investigative report. In interpreting the cases, however; one must distinguish between government conduct in violation of constitutional rights and government conduct which violates fairness; the latter would be more prevelant in these cases.

[94] The Federal Trade Commission imposes no restrictions on subpoenas, although general relevancy and materiality would be required by the hearing officer ruling on a subpoena. 16 C.F.R. §§ 3.34–.35 (1970). The Federal Power Commission has the same rule, but is explicit as to a showing of relevancy and materiality. 18 C.F.R. § 1.28 (1970). The Federal Maritime Administration provides that if the subpoena sought appears to be unreasonable, oppressive, excessive in scope or unduly burdensome, the requester may be required to show the general relevancy and reasonable scope of the evidence sought. 46 C.F.R. § 502.131 (1970).

[95] The civil rules are completely open as to subpoenas for witnesses and limit subpoenas for the production of documents only if shown to be unreasonable, oppressive or too costly. FED. R. CIV. P. 45(a), (b). The criminal rules contain the same provisions as in the civil rules, but an indigent must make a "satisfactory showing" that he is unable to pay witness fees and that the presence of the witness is "necessary to an adequate defense." FED. R. CRIM. P. 17.

[96] MCM 1969 (REV.), para 115*a*. *See* United States *v.* Harvey, 8 U.S.C.M.A. 538, 25 C.M.R. 42 (1957); United States *v.* DeAngelis, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953). It should be noted that the government provides funds for all witnesses, regardless of the accused's ability to pay.

be forced into accepting a deposition instead.[97] The discharge board respondent is unique in being without an effective means of compelling the attendance of witnesses.

Presently, military witnesses who are not a "substantial distance" away can be ordered to appear at a discharge board by their commanders.[98] The burden of requesting witnesses, including those adverse to his case, may fall directly on the respondent and he has been held to have "waived" confrontation and cross-examination by failing to use the regulatory provisions available to him.[99] He cannot compel the attendance of civilian witnesses, but if a witness whose testimony is deemed material accepts invitational travel orders, some compensation may be made for his atttendance.[100] Therefore, the respondent's options in presenting his defense may be limited by the witnesses he can persuade to appear.

The proposals for subpoena powers in the Ervin and Bennett bills are the same as currently found in Article 46 of the UCMJ [101] except they allow the Secretary of Defense to formulate the rules and procedures rather than the President. This has been the Department of Defense position.[102] The major objection to the court-martial subpoena procedures has been that the defense must reveal its evidence in requesting a subpoena.[103] These procedures will probably be carried over into the board procedures, since it would be anomalous to have a more liberal rule for administrative actions. Since the government is paying the witnesses' fees, it is not unfair to impose some inconvenience

[97] United States *v.* Thornton, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957).

[98] Army Reg. No. 15–6, para 13*b* (12 Aug. 1966).

[99] Brown *v.* Gamage, 377 F.2d 154 (D.C. Cir. 1967). This case involved a Board of Inquiry hearing on allegations that the respondent (LTC Gamage) falsified weather reports. He objected to the use of *ex parte* statements as a denial of his right to confrontation. The court, however, never reached the sixth amendment issue as it found he had failed to make any attempt to use the procedures prescribed in applicable Air Force regulations for requesting depositions and military witnesses.

[100] The Comptroller General has ruled that a witness appearing on invitational travel orders may be paid per diem and travel if the presiding officer finds that his testimony is substantial and material and that an affidavit would not be adequate. 48 COMP. GEN. 644 (1969). This ruling has since been implemented by regulation. 2 Joint Travel Regs. for the Uniformed Services, para C5000.2 (10) (Change No. 53, 2 Jan. 1970).

[101] *Compare* S. 2247, 92d Cong., 1st Sess. § 960 (a) (1971) *and* H.R. 523, 92d Cong., 1st Sess. 3 (1971) *with* UNIFORM CODE OF MILITARY JUSTICE, Art. 46.

[102] *1966 Hearings* 360, 389.

[103] *See* MCM 1969 (REV.), para 115; Melnick, *The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint*, 29 MIL. L. REV. 1, 5 (1965). Such a procedure is not tactically desirable to the defense.

on the respondent so as to avoid excessive costs due to repetitious or immaterial witnesses.

One provision already existing in the regulations, which could help avoid subpoena problems, is the requirement that essential military witnesses be screened for termination or transfer status.[104] Unfortunately, this provision is directed to the appointing authority after he decides to convene a board, or to the board after its appointment. Should a case remain in the company or battalion headquarters for several months before it is forwarded to the board appointing authority, it is possible that essential witnesses will have departed.[105] The screening, therefore, should be done by the officer who initiates the recommendation for discharge, usually the respondent's company or battery commander. This would not only assist in insuring confrontation, but would also help speed up the processing since it is likely that intermediate commanders would normally be sympathetic to the witnesses' delays. Another way to strengthen this provision would be to allow an automatic subpoena for any military witness who is desired by the respondent and who could have been held in the command as of the date of the unit commander's receipt of the respondent's request for a board hearing.[106]

With the granting of *Article 46* subpoena powers to the board, plus the use of the holding provision, the respondent should have effective confrontation. At the same time, the military will avoid future litigation and possible reversal under the *Jenkins* rationale.

C. *THE DEPOSITION.*

Senator Ervin's bill also provides for the use of oral or written depositions, unless forbidden for good cause, under regulations issued by the Secretary of Defense.[107] In analyzing this proposal,

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[104] Army Reg. No. 635-206, para 10*b* (15 Jul. 1966); Army Reg. No. 635-212, para 14*d* (15 Jul. 1966).

[105] The ability to use statements and affidavits of witnesses who have departed from the command could have the unhealthy effect of creating a lax attitude in processing board cases while prompt action in courts-martial has always been stressed. It could be postulated that a defense of "lack of speedy hearing" in board actions would correct this situation.

[106] To effectuate this, the unit commander's notification of recommended elimination action should request the names of all desired witnesses and force the respondent, in his reply, to make his demands for holding actions. The commander's notification is the first formal notice that the respondent has of the discharge action. *See, e.g.*, Army Reg. No. 635-212, para 10 (13 Jul. 1966).

[107] S. 2247, 92d Cong., 1st Sess. § 960(b) (1971). Mr. Bennett's bill contains no provision for depositions. H.R. 523, 92d Cong., 1st Sess. (1971).

there are three aspects which concern the lawyer who must deal with depositions—the taking, the form, and the use.

The bill states two conditions for the taking of a deposition. One is that it may be accomplished only after the notice to appear is issued. The problem with this condition is that it puts the deposition late in the proceedings and thus does not make it available for the preservation of evidence. In federal civil cases, depositions can be taken anytime after the commencement of the action and, in special cases, before commencement of an action.[108] The federal criminal rules allow taking a deposition only after the filing of an indictment or information, a rule similar to that applied in military courts-martial.[109] While administrative agencies allow a relatively free deposition practice before hearing officers,[110] a military board respondent currently has to request a deposition from the witness' commander, after the board has been appointed.[111] Thus, the board respondent must wait until late in the process to obtain his depositions, a fact which can hurt him in preserving testimony. The taking of depositions earlier in the elimination process would not be novel in light of the current practices in federal courts and agencies. Not only would that procedure free the government from having to use an excessive number of administrative holds on witnesses, it would aid the respondent in developing a positive defense. The most appropriate time for first allowing depositions would be at the time the respondent requests a board hearing.

The second condition regarding the taking of depositions is that they may be denied for "good cause." This is the current rule applied in courts-martial.[112] Federal courts are very lenient

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[108] FED. R. CIV. P. 30, 31 (depositions pending action); FED. R. CIV. P. 27(a) (depositions before action).

[109] FED. R. CRIM. P. 15(a); UNIFORM CODE OF MILITARY JUSTICE, Art. 49(a). (Depositions allowed anytime after charges have been signed.) This stage in the criminal proceeding is analogous to the time that a commander makes his recommendation for elimination.

[110] The federal administrative procedure gives officers presiding at hearings the authority to order depositions "whenever the ends of justice would be served thereby." 5 U.S.C. § 556(c)(4) (Supp. IV 1969). The Federal Trade Commission allows depositions to preserve evidence upon a showing of extraordinary circumstances. 16 C.F.R. § 3.33 (1970). The Federal Power Commission allows depositions in any pending action. 18 C.F.R. § 1.24 (1970).

[111] Army Reg. No. 15–6, para 13*b* (12 Aug. 1966). The approval of the deposition request is at the commander's discretion, but not until a board is appointed. The regulation does prescribe that if personal appearance is not feasible, the evidence should be obtained by deposition or affidavit.

[112] UNIFORM CODE OF MILITARY JUSTICE Art. 49(a).

in allowing depositions,[113] and administrative agencies allow them at the hearing officer's discretion.[114] Unless commanders abuse this discretion, the general requirement of good cause should not present a problem for the respondent.

The next issue to consider is the form of the deposition. Generally, written interrogatories are less satisfactory than oral depositions,[115] and should only be used when absolutely necessary. The use of oral depositions, however, presents a travel funding problem if the witness is a substantial distance from the board situs. The proposed bill provides a partial solution to this problem by providing for the use of assistant counsel.[116] While this is not always a desirable alternative to the presence of the respondent, it is more desirable than limiting non-local depositions to written interrogatories.

Concerning the use of depositions, the present board rule is that they may be used if a witness is a substantial distance from the site of the board hearing.[117] In the federal sphere, the civil rules provide nine instances for the use of depositions as compared to five conditions allowed in criminal cases.[118] Courts-martial

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[113] In civil cases, a deposition may be taken in a pending case without leave of court, except that notice is required for a deposition to be taken within 30 days after commencement of the action. FED. R. CIV. P 30(a). In criminal cases, the defendant must show that a prospective witness may be unable to attend, that his testimony is material and that the deposition is necessary to prevent a failure of justice. FED. R. CRIM. P. 15(a). In applying the rule, courts have been liberal. *See* United States *v.* Hagedon, 253 F. Supp. 969 (S.D.N.Y. 1966) (need only show testimony material and reasonably expected to exonerate defendant); *In re* United States, 348 F.2d 624 (1st Cir. 1965) (courts have broad discretion when applying rules.)

[114] The Federal Trade Commission provides that the hearing officer, in his discretion, may order the taking of a deposition, for discovery purposes or to preserve evidence. 16 C.F.R. § 3.33(a) (1970). The Federal Power Commission allows the Commission or a presiding officer to authorize a deposition if warranted. 18 C.F.R. § 1.24(a), (c) (1970).

[115] The Court of Military Appeals made this observation, saying that much of the art of cross-examination depends upon molding questions to the answers given to previous questions which is not possible in taking written interrogatories. This is why the defendant and his counsel should be present at the taking of a deposition, United States *v.* Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[116] S. 2247, 92d Cong., 1st Sess. § 960(b) (3) (1971). Assistant counsel would be a lawyer and would probably be assigned to the installation at or near the place of the taking of the deposition.

[117] Army Reg. No. 15–6, para 13*b* (12 Aug. 1966). There is no guidance, however, as to what is a "substantial" distance, but it might be equated to the 100 mile rule used in courts-martial. *See* UNIFORM CODE OF MILITARY JUSTICE Art. 49(d) (1).

[118] The criminal and civil rules allow the use of depositions if the witness is dead, outside the United States, unavailable due to sickness or infirmity or if he fails to answer a subpoena. The civil rules allow the use of a deposition

rules are even more liberal, allowing eleven exceptions for the use of depositions,[119] but these have been curtailed as to military witnesses by the Court of Military Appeals.[120] If subpoenas are to be used to provide more confrontation at board hearings, the use of depositions should be no more than that permitted in a court-martial. Even then their use will be more prevelant than is found in some federal agencies.[121]

IV. THE STANDARD OF PROOF

A. *THE VARIOUS STANDARDS AVAILABLE.*

The American Bar Association resolution, Mr. Bennett and Senator Ervin propose that all discharge board decisions be based on a preponderance of the evidence.[122] The current Army regulation provides that decisions will be founded upon substantial evidence.[123] The issue thus posed by the recommended change in the standard of proof is whether the substantial evidence test is definite and strict enough to insure that an undesirable discharge will not be imposed in a case where there is room for doubt that the misconduct occurred or that it deserves the discharge stigma. The answer to this issue can be found in an examination of the substantial evidence standard and some possible alternatives.

1. *Substantial Evidence*

The early administrative agency statutes provided that the decisions of the agencies were conclusive if "supported by evi-

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if the witness is 100 miles from the court, unavailable due to age or confinement or if exceptional circumstances exist. FED. R. CRIM. P. 15(e); FED. R. CIV. P. 32(a) (3).

[119] To the circumstances allowed in the federal civil rules, the military adds military necessity and whereabouts of the witness unknown. UNIFORM CODE OF MILITARY JUSTICE Art. 49(d).

[120] The Court of Military Appeals ruled that since all servicemen on active duty are within the jurisdiction of the military court, the prosecution must show actual unavailability and not merely that a serviceman-witness is 100 miles away. The court reasoned that the defendant was entitled to look upon his accusers and have the court-martial consider their demeanor, and that in this day of speedy transportation there is no real basis for a deposition without some true military necessity. United States *v.* Davis, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970).

[121] *Compare* 16 C.F.R. § 3.33(f) (2) (1970) (Federal Trade Commission) *with* UNIFORM CODE OF MILITARY JUSTICE Art. 49(d).

[122] 93 A.B.A. Rep. 577 (1968); H.R. 523, 92d Cong., 1st Sess. 2 (1971); S. 2247, 92d Cong., 1st Sess. § 944 (1971). There is support in the Defense Department for this change. *See, e.g.* Address by Brigadier General (now Major General) Harold E. Parker, Military Law Section, Georgia State Bar Association, Dec. 1969, 6 GA. STATE BAR J. 263, 276 (Feb. 1970).

[123] Army Reg. No. 15-6, para 20 (12 Aug. 1966).

dence." [124] The Supreme Court interpreted this phrase to mean "supported by substantial evidence." [125] Thereafter this latter phraseology was used in almost all federal agency statutes.[126] Most notably, this language was written into the Administrative Procedure Act,[127] and thus has become the general rule for determining the validity of administrative fact-finding decisions.[128]

The most common definition of substantial evidence is any relevant evidence that a reasonable mind might accept as being adequate to support a conclusion.[129] While this definition seems relatively clear in its meaning, it has been interpreted in very different ways. It has been deemed to be no more than a step beyond a mere scintilla of evidence on the one hand and as being almost a preponderance of the evidence on the other hand.[130] It has been defined as more than uncontraverted hearsay,[131] and as being evidence which raises no more than an equal choice of possibilities.[132] A good example of the confusion surrounding the nature of the substantial evidence standard is seen in the following comment by the New Mexico Supreme Court:

> Ordinarily, the evidence is deemed *substantial* if it tips the scales in favor of the party on whom rests the burden of proof. . . .

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[124] *See, e.g.*, 15 U.S.C. § 45(c) (1964) (Federal Trade Commission Act, the first to contain this provision on finality).

[125] Consolidated Edison Co. *v.* NLRB, 305 U.S. 197, 229 (1938) (interpretation of National Labor Relations Act. § 10(e), 49 Stat. 455). The Court did not give any detailed reasoning for its opinion that the statute meant "substantial evidence." It pointed out that substantial evidence was more than a mere scintilla of evidence or uncorroborated hearsay and that either would be an insufficient basis of probative force despite the great flexibility in administrative procedures.

[126] *See, e.g.*, Federal Communications Act, § 402(e), 48 Stat. 1094 (1934); Federal Power Commission Act, 16 U.S.C. § 825*l* (b) (1964); Securities Exchange Act, 15 U.S.C. § 78(y) (a) (1964). These acts are illustrative of about 18 acts passed since 1914 which incorporate the "substantial evidence" standard. *See* Stason, *"Substantial Evidence" in Administrative Law*, 89 U. PA. L. REV. 1026 (1941). The term has not, however, been widely used in state statutes. Dickinson, *The Conclusiveness of Administrative Fact Determinations Since the Ben Avon Case*, 16 PITT. U. F. 30 (1935).

[127] Section 7 U.S.C. § 556(d) (Supp IV 1969).

[128] Stason, *supra* note 126.

[129] Miller *v.* Commissioner, 203 F.2d 350 (6th Cir 1953); NLRB *v.* Louisville Ref. Co., 102 F.2d 678 (6th Cir.), *cert. denied*, 308 U.S. 568 (1939).

[130] Jaffee, *Judicial Review: "Substantial Evidence on The Whole Record,"* 64 HARV. L. REV. 1233 (1951).

[131] Knudsen Co. *v.* NLRB, 276 F2d 63 (9th Cir. 1960); *accord*, Consolidated Edison Co. *v.* NLRB, 305 U.S. 197, 229 (1948).

[132] Galloway *v.* United States, 130 F.2d 467 (9th Cir 1942), *aff'd*, 319 U.S. 372 (1943).

> He is then said to have established his case by a *preponderance* of the evidence.[133]

2. *Preponderance of the Evidence.*

The preponderance of the evidence standard is universally applied in civil cases,[134] and can best be described as:

> that evidence which, after a consideration of all the evidence, is . . . entitled to the greatest weight. Or . . . that the testimony which points to a certain conclusion appears . . . to be more credible and probable.[135]

This definition has been interpreted as meaning that a party's evidence must be more convincing than that offered by the opposing party,[136] or containing the greater probability of truth.[137] Thus, the test is one of weight, and, where the evidence is equally consistent with two or more opposing propositions, it is insufficient.[138] The utility of this standard is in its uniformity of definition and application, and in its requirement that the fact-finder consider and weigh all of the evidence presented before arriving at a decision.

3. *Clear and Convincing Evidence.*

The clear and convincing evidence standard, although not proposed for use in military discharge boards, is a possible alternative to either of the other two standards.[139] The test is best defined as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.[140] It can also be defined

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[133] Lumpkin *v.* McPhee, 59 N.M. 442, 286 P.2d 299 (1935) (emphasis added).

[134] *E.g.*, Chicago Stock Yards Co. *v.* Commissioner, 129 F.2d 937 (1st Cir. 1942); Hirsch v. Upper South Dep't of Int'l Ladies Garment Workers Union, 167 F. Supp. 531 (D. Md. 1958); Delaware Coach Co. *v.* Savage, 81 F. Supp. 293 (D.Del. 1948); 32A C.J.S. *Evidence* § 1018 (1964); 30 AM. JUR. 2d *Evidence* § 1163 (1967).

[135] United States *v.* Southern Pac. Co., 157 F. 459 (N.D. Cal. 1907); *accord*, Northwest Elec. Co. *v.* FPC, 134 F.2d 740 (9th Cir 1949), *aff'd*, 321 U.S. 119 (1944).

[136] United States *v.* Kansas Gas & Elec. Co. 295 F. Supp. 532 (D. Kan. 1963).

[137] Burch *v.* Reading Co., 240 F.2d 574 (3d Cir.), *cert. denied*, 353 U.S. 965 (1957).

[138] Pittman *v.* West Am. Ins. Co. 299 F.2d 405 (8th Cir. 1962); Richmond *v.* Atlantic Co., 273 F.2d 982 (3d Cir. 1960). In this situation, the courts refer to the evidence as being in "equipose."

[139] In view of the congressional concern for increasing the safeguards of a board respondent, this standard of proof would be the closest they could come to a criminal standard of proof without reference to a court-martial.

[140] Cross *v.* Ledford, 161 Ohio St. 469, 120 N.E. 2d 118 (1954).

as simply more than a preponderance of the evidence but less than evidence beyond a reasonable doubt.[141] It has been said that this standard should be used where the wisdom of experience demonstrates the need for great certainty,[142] such as in determining claims which have a serious social effect on an individual, which require proof of willful, wrongful or unlawful acts, or which involve the court in granting an exceptional judicial remedy.[143]

The clear and convincing evidence standard has been used in deciding cases involving contests of citizenship, both in the matter of determining citizenship[144] and revoking naturalization.[145] In both situations, the courts have noted that they were dealing with cases of great personal importance and consequently the issues were too serious to be handled by any standard less than the most exacting one applicable to civil cases. In view of the fact that at least one court has stated that an honorable discharge is a valuable personal and property right,[146] should not the clear and convincing evidence test be applied to the undesirable discharge proceeding?

B. *THE MILITARY APPLICATION*

The standard established by the Army's regulation is that

Each finding must be supported by substantial evidence, which

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[141] *In re* Palmer, 72 N.M. 305, 383 P.2d 264 (1963) (disbarment proceeding); Chaessman *v.* Sathre, 45 Wash. 2d 193, 273 P.2d 500 (1954).

[142] United States *v.* Bridges, 133 F. Supp. 638 (N.D. Cal. 1955); Ly Shew *v.* Acheson, 110 F. Supp. 50 (N.D. Cal. 1953).

[143] *See* Ly Shew *v.* Acheson, 110 F. Supp. 50 (N.D. Cal. 1953); 32A C.J.S. *Evidence* § 1023 (1964).

[144] Ly Shew *v.* Acheson, 110 F. Supp. 50 (N.D. Cal. 1953). The court was faced with a suit by a Chinese immigrant who desired to be declared an American citizen. Most of the testimony was in Chinese and the testimony, as translated, was full of conflicts and inconsistencies which made it impossible to make any determination of credibility. Additionally, State Department statistics showed fraud and perjury were common in cases of this nature. Considering that cases of denaturalization were generally decided by clear and convincing evidence, and the propensity for fraud in the instant case, the court decided that the petitioner must establish his right to citizenship by clear and convincing evidence.

[145] United States *v.* Bridges, 133 F. Supp. 638 (N.D. Cal. 1955). The defendant was on trial for allegedly obtaining naturalization by fraud. The court determined that the right of citizenship, once conferred, should not be lightly revoked and thus required the government to prove its allegations by clear and convincing evidence.

[146] "An honorable discharge encompasses a property right, as well as civil rights and personal honor." Bernstein *v.* Herren, 136 F. Supp. 493, 496 (S.D.N.Y. 1956).

> is defined as such evidence as a reasonable mind can accept as adequate to support a conclusion.[147]

Senator Ervin's previous bill also contained the substantial evidence standard, but without defining it.[148] The adoption of the preponderance of the evidence standard is one of only two changes in the Senator's new version of his bill.[149]

The issue thus presented is whether the substantial evidence standard should be retained and, if not, what standard should replace it. One argument that can be made for retaining the standard is that it is the test universally applied in federal administrative actions,[150] and a discharge board is an administrative proceeding.[151] As previously discussed, however, this argument is not totally acceptable.[152] While board members are chosen for their experience, maturity and lack of bias, there is no necessary correlation between these traits and many of the technical issues underlying the various bases for elimination from the service. Only one of the members is required to be a senior officer and the experience of each officer will vary greatly due to his branch, type of assignments and years of service. An officer who has had primarily staff assignments will bring a different viewpoint to the board than an officer who has had numerous troop assignments. Some problems, such as homosexuality, alcoholism, and character disorders, may be better understood by doctors and psychiatrists than by ordnance specialists. Thus, the board is more akin to a jury in its composition.

A second argument is that the application of a stricter standard would place an unwarranted burden on the government. More preparation time would be required to build a case and some meritorious separation actions would flounder on the higher proof standard. These arguments, however, are easily countered by the fact that the respondent faces a possible lifelong stigma

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[147] Army Reg. No. 15–6, para 20 (12 Aug. 1966). The regulation also provides, but without reference to the degree of proof, that all evidence shall be accorded such weight as is warranted under the circumstances. *Id.*, at para 10. One discharge regulation also provides that the president of the board will insure that sufficient evidence is presented to the board for evaluating the respondent's usefulness. Army Reg. No. 635–212, para 17*c*(5) (15 Jul. 1966).

[148] S. 2247, 92d Cong., 1st Sess. § 944(a)(7) (1971).

[149] The other change occurs in section 964 wherein drug abuse and related offenses are deleted as grounds for discharge for unfitness and made a basis for unsuitability discharge. *Compare* S.2247, 92d Cong., 1st Sess. (1971), *with* S.1266, 91st Cong., 1st Sess. (1969).

[150] Stason, *supra* note 126.

[151] Army Reg. No. 15–6, para 10 (12 Aug. 1966).

[152] *See* section II, A, *supra*.

if he receives an undesirable discharge.[153] Requiring the government to meet a higher degree of proof will bring the proceedings into greater balance.

If the substantial evidence standard is not retained, what standard should be adopted? As previously suggested, one choice is the clear and convincing test, which could be appropriate because the undesirable discharge meets several of the tests for this higher standard of proof.[154] The stigma of the discharge has a serious social and economic result on the ex-serviceman [155] and affects a valuable personal and property right.[156] However, the standard is very exacting and would require the government to develop a case almost as convincing as needed to obtain a court-martial conviction.[157] If such a case is required, the tendency might well be to do the little extra work necessary to go to a court-martial where the government could obtain a punitive discharge and a federal conviction.[158] This action would give the serviceman the full range of judicial safeguards and satisfy Chief Judge Quinn's complaint,[159] but would also reduce the usefulness of a prompt administrative system of discharge.

The preponderance of the evidence standard thus remains as the best standard because it is definite, can more easily be applied in a uniform manner, and is not so demanding that the administrative system will become ignored. It brings the weight and credibility of *all* the evidence into direct consideration in the decision making process. Finally, it requires a degree of proof

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[153] *See* section I, B, *supra*.

[154] Ly Shew *v.* Acheson, 110 F. Supp. 50 (N.D. Cal. 1953). *See* text accompanying notes 139–41, *supra*.

[155] Bland *v.* Connally, 293 F.2d 852 (D.C. Cir. 1961); Unglesby *v.* Zimney, 250 F. Supp. 714 (N.D. Cal. 1965); Glidden *v.* United States, 185 Ct. Cl. 515 (1968); Sofranoff *v.* United States, 165 Ct. Cl. 470 (1964).

[156] Bernstein *v.* Herren, 136 F. Supp. 493 (S.D.N.Y. 1956); United States *v.* Keating, 121 F. Supp. 477 (N.D. Ill., 1949). The respondent not only suffers the loss of an honorable discharge, but may also lose many veteran's benefits because of an undesirable discharge.

[157] The court-martial standard is evidence which convinces the court beyond a reasonable doubt. MCM 1969 (REV.), para 74*a*.

[158] Senator Ervin's bill provides that no member would be discharged administratively for conduct which constitutes an offense under the *Uniform Code of Military Justice*, except in cases involving a civil conviction or a prolonged unauthorized absence. S.2247, 92d Cong., 1st Sess. § 943(b) (1971). In view of the armed forces' position that a commander should have the choice of a court-martial or an administrative board in any given case, *1966 Hearings* 361–84, the analysis here is premised on the position that the grounds of elimination for administrative boards will not be so drastically restricted and that the effects of any specific standard of proof should be evaluated on that basis.

[159] *See* note 4, *supra*.

more in balance with the detriment of the undesirable discharge. In all of these respects it aids in establishing fundamental fairness in the discharge proceeding.

V. THE LEGAL ADVISOR

The desire to increase the safeguards afforded a respondent at a military discharge hearing by creating more restrictive and complex rules of evidence creates a problem if the application of these rules is left solely in the hands of the board members. Application of the proposed rules, especially those of constitutional magnitude, requires legal training and experience on the part of the person who is to administer them at the hearing. The solution which most readily comes to mind is to have a legal officer appointed to the board to serve this purpose. Senator Ervin has proposed the appointment of such an officer, the "legal advisor," to serve on discharge boards at the discretion of the appointing authority or the request of the respondent or the board.[160] Under the Ervin bill, the legal advisor would not only be the arbiter of the admissibility of evidence, but would also rule on all motions and challenges.[161]

The Department of Defense initially was opposed to such a proposal, stating that the appointment of qualified counsel to assist the respondent afforded adequate protection of essential rights.[162] It was further stated that while there were some cases where the issues were complex enough to make it desirable for the government to provide legal assistance to the board, this would give no greater protection to the individual. Finally, the Department pointed out that the requirement for a legal advisor would considerably increase the number of lawyers required by the services. Since these original arguments were made, there appears to have been some movement toward accepting the legal advisor proposal. In late 1969, for example, Major General Parker

[160] S.2247, 92d Cong., 1st Sess. § 946 (1971). The proposed section states that the appointing authority "may" detail a legal advisor when he deems it desirable because of the complexity of the legal issues, but that he "shall" detail a legal advisor at the request of the respondent unless there are compelling reasons for refusal. There is no guidance as to what these "compelling reasons" might be. A legal advisor is defined as a commissioned officer qualified under UNIFORM CODE OF MILITARY JUSTICE, art. 27(b) (1) and certified by the Judge Advocate General for duty as a legal advisor. 10 U.S.C. § 942 (9).

[161] S.2247, 92d Cong., 1st Sess. sec. 961(b) (1971). Such an officer would resemble the "law member" who sat on courts-martial forty years ago. *See* discussion accompanying note 168, *infra*.

[162] *1966 Hearings* 357 (testimony of Brigadier General William W. Berg, Deputy Assistant Secretary of Defense for Military Personnel Policy).

stated that he favored the bill introduced by Mr. Bennett,[163] but would like to see added to it a provision for a legal advisor.[164] Perhaps this is a recognition by some officials within the Department of Defense that the average board member would not be equipped to handle the new procedures under discussion and that the success of any more extensive safeguards lies in the direct application of legal expertise.[165]

Should the legal advisor be more than simply an arbiter of the admissibility of evidence? The possible consequence of giving him more authority than is deemed essential for insuring compliance with new evidentiary rules is that in time the board could develop into a specialized "court," if indeed not merged with the court-martial system. Such a trend is found in the civilian administrative agencies by one writer who foresees the agency hearing examiners becoming a quasi-judicial officers, making decisions which would be final without subsequent approval by the agency administrators.[166] While the legal advisor envisioned by Senator Ervin would not be the equal of the independent civilian hearing examiner,[167] he could take the first step in a possible evolution.

The precedent within the military for such an evolution is not lacking. Forty years ago a court-martial had a "law member" who was to be a judge advocate. If one was not available, any officer "specially qualified" could be detailed.[168] He was a member of the court and it was his duty to rule on interlocutory questions.

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[163] H.R. 523, 92d Cong., 1st Sess. (1971). Unlike Senator Ervin's bill, the legislation introduced by Mr. Bennett contains no provision for appointing a legal advisor.

[164] *Supra*, note 122, at 276. The legal aspects of administrative discharge boards were at that time in General Parker's area of responsibility within the Department of the Army, and his statement might be seen as an indication that at least the Army is no longer opposed to the legal advisor proposal.

[165] The proposed legal advisor has also been discussed by several law review authors. One writer stated that the movement for the creation of a "military judge" in courts-martial opened the way for the legal advisor proposal. Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41. Others saw no need for a legal advisor since the rules of evidence have been traditionally lax, Dougherty and Lynch, *Administrative Discharge: Military Justice?*, 33 GEO. WASH. L. REV. 498 (1964), and felt that the proposal was, in effect, the appointment of a military judge to a board. Lynch, *The Administrative Discharge: Changes Needed?*, 22 MAINE L. REV. 141 (1970).

[166] Lorch, *Administrative Court via the Independent Hearing Officer*, 51 JUDICATURE 114 (1967).

[167] *See* 5 U.S.C. §§ 556–57 (Supp IV 1969).

[168] Manual for Courts-Martial, United States, 1928, paras. 4*c*, 40. The term "specially qualified" was not defined, but implied training in military law.

When the *Uniform Code of Military Justice* went into effect twenty years later, this member, who was now required to be a judge advocate, was separated from the court panel and acted in a capacity "similar" to that of a judge.[169] Now, under the amended Code, he is a "military judge," with almost total judicial powers, including the authority to hear cases sitting alone.[170]

The possible evolution of an administrative discharge court is not necessarily undesirable, but it does have certain drawbacks. The more complex the procedures become, the greater will be the need for military attorneys to serve as counsel for both parties and as the "hearing judge." The necessary additional manpower and administrative funds would most likely cause a decline in the use of the system in favor of courts-martial. If the funds are not available, the result would be delay caused by insufficient resources.[171] In essence, the system would become so geared to safeguarding the rights of individuals that the military services would suffer from not having a prompt method of eliminating those who are not fit for military service.[172] It must also be recognized that the undesirable discharge is not a punitive measure, such as confinement or forfeiture. While there are areas in the board proceeding where more legal protections could be established, no one has yet suggested that the stigma associated with the undesirable discharge is so great as to change the system from administrative to judicial in nature.

Therefore, assuming that the discharge procedures should remain basically administrative in nature, the use of the legal advisor should be as limited as possible to minimize the potential for "evolution." His role should be that of the legal arbiter of evidence admissibility, with no part in determining the weight or credibility of the evidence once admitted. Nor should he become involved in deciding motions and challenges, since these would play a lesser role in a board proceeding than they do in a court-martial.[173] Because of the limitation in available military

[169] Manual for Courts-Martial, United States, 1951, para 39. *See* United States *v.* Berry, 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952); United States *v.* Richardson, 1 U.S.C.M.A. 558, 4 C.M.R. 150 (1952).

[170] MCM 1969 (REV.), para. 39.

[171] The lack of sufficient attorneys to serve as legal advisors was raised by both Brigadier General Berg, *1966 Hearings* 357, and the ABA Special Committee report on Senator Ervin's bill. 93 A.B.A. Rep. 577 (1968).

[172] This is the explicit, single purpose of at least one separation regulation. Army Reg. No. 635–212, para 1 (15 Jul. 1966).

[173] There is no motion practice in board proceedings as to lack of a speedy trial, mistrial, or finding of not guilty which are common to the court-martial.

lawyers, the use of the legal advisor should be totally discretionary with the appointing authority if the system is not to flounder for lack of available manpower.

VI. RECOMMENDATIONS AND CONCLUSIONS

The preceding sections have discussed some of the issues raised concerning the administrative discharge system, focusing on pertinent sections of the bill introduced by Senator Ervin.[174] It is appropriate that Congress exercise its constitutional powers to make rules for the regulation of discharge proceedings,[175] making the desired safeguards binding on the services.[176] The conclusions arrived at in the preceding sections will here be brought together into a legislative scheme based in part on Senator Ervin's proposals.

The basic rule of evidence for the discharge board should be premised on the need to exclude improper evidence and to preclude a decision founded totally on hearsay evidence. Thus, the legislation should provide that:

> The Secretary of Defense shall prescribe rules regarding the admissibility of evidence which is material, relevant, probative, and the result of a lawful search or interrogation, or which is not otherwise proscribed herein. The rules concerning the legality of a search or confession will be those currently in force in courts-martial. In no case will any decisions of a board be based entirely on hearsay evidence excluded in civil cases.

This provision, in referring to the rules used in courts-martial, would create some uniformity between the administrative and judicial systems, decreasing possible use of the former to circumvent the protections of the latter.

The "otherwise proscribed" evidence refers to the specific evidentiary prohibitions proposed by Senator Ervin in section 959 of his bill. These should be retained.[177] The proscription

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It is possible that motions based on former jeopardy or the admissibility of evidence would increase, but the former should be handled in the legal review before the appointment of the board and the latter would fall within the scope of the legal advisor's duties as arbiter of the evidence.

[174] S.2247, 92d Cong., 1st Sess. (1971).

[175] "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces; . . ." U.S. CONST., Art. I, sec. 8.

[176] This observation was made in the report of the ABA Special Committee on Military Justice concerning minimum safeguards for discharge proceedings. 93 A.B.A. Rep. 577 (1968). The current rules are found in Department of Defense Directive 1332.14 (Dec. 20, 1965) and can be changed at the discretion of the Secretary.

[177] S.2247, 92d Cong., 1st Sess. § 959 (1971). *See* section II, B, *supra*.

on the use of evidence of acts occurring more than three years in the past or before the current enlistment, whichever is longer, is a feasible statute of limitations for discharge cases. The double jeopardy provision is not new but does increase the respondent's safeguards by removing the authority of the Department of the Army to grant certain exceptions.[178] Finally, the requirements that the respondent be allowed to cross-examine investigators and be liable for elimination only on classified reports actually released to him brings the military practice in line with the judicial decisions on "secret" evidence.[179] However, the general prohibition against all adverse evidence without the opportunity for cross-examination of the informer is too broad. Sufficient protection is granted, within the boundaries of administrative law, by prohibiting a decision based solely on judicially objectionable hearsay.

In addition to the above limits, Congress should also provide that:

> Except for depositions, investigative reports, confessions or admissions of the respondent and written stipulations, no document will be received in evidence unless it is an official record, a business entry or a properly authenticated writing in accordance with the rules currently applied in courts-martial.

Thus, the respondent will be protected from the use of documents such as the FBI identification record mentioned previously.[180]

The provisions of Senator Ervin's bill for the use of subpoenas and depositions in a manner similar to that found in courts-martial are desirable. The subpoena power at the hearing level will do much to increase the opportunity for confrontation. The deposition provisions, however, should be amended to allow the taking of a deposition at any time after the respondent makes his election to appear before a board of officers. The automatic subpoena in cases where an administrative hold was not used to retain a probable witness, as well as the question of requiring this holding action earlier in the discharge proceeding, are added safeguards which go beyond minimum needs. Such pro-

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[178] *Compare* S.2247, 92d Cong., 1st Sess. § 959(c) (1971), *with* Army Reg. No. 635–200, para 1–13 (15 Jul. 1966).

[179] *See* Greene *v.* McElroy, 360 U.S. 474 (1959); Vitarelli *v.* Seaton, 359 U.S. 535 (1959); Bland *v.* Connally, 293 F.2d 852 (D.C. Cir. 1961); Glidden *v.* United States, 185 Ct. Cl. 515 (1968); Clackum *v.* United States, 148 Ct. Cl. 404 (1960).

[180] *See* section II, C, *supra*.

visions might better be left to the discretion of the Secretary of Defense.

The standard of proof in discharge cases plays an important role in the board's decision making process. The need for increased definiteness, uniformity, and consideration of all the evidence is best provided in the preponderance of the evidence standard. The legislation would aid uniformity by including the following:

> A preponderance of the evidence is defined as evidence submitted by a proponent which, after consideration of the weight and credibility of all the evidence presented, is entitled to the greater weight and probability of truth.

With the increased complexity in the rules of evidence to be applied at the board hearing, the appointment of a legal advisor is most desirable. The role of the legal advisor should be strictly defined in order to retain the full administrative nature of these proceedings. He should be appointed at the discretion of the appointing authority in those cases involving complex legal issues, and should do no more than rule on the admissibility of evidence. In this way he will insure compliance with the technical evidentiary rules and yet keep the possibility for "evolution" into an administrative "judge" at a minimum.

The Department of Defense is in general agreement with the board objectives of the proposed legislation, namely, "to insure that the essential rights of our citizens are protected while in the military service." [181] In recommending what it believed to be the minimum standards for discharge proceedings, the American Bar Association Special Committtee on Military Justice stated that there must be a balance between the needs of the service and "preserving to military personnel the traditional basic notions of fair play and administrative due process." [182] It is this balancing which the military is being forced to contend with in the legislation proposed by Senator Ervin. It is the author's belief that there must be some changes in the current approach to evidence in the administrative discharge board, and that the recommendations made above represent a practical and legally acceptable balance.[183]

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[181] *1966 Hearings* 360.

[182] 93 A.B.A. Rep. 577 (1968).

[183] The author also believes that these recommended changes would do enough to improve the discharge process, and that further, more sweeping changes in such matters as the grounds for elimination and review would cause a substantial decrease in the use of administrative measures where they were more appropriate, and a corresponding increase in courts-martial.

MILITARY CONTEMPT LAW AND PROCEDURE*

By Major John A. McHardy, Jr.**

After several decades of judicial tranquility, "order in the court" has become a phrase of real meaning. The military, though less spectacularly than the civilian courts, has suffered from the contemptuous witness, attorney, or spectator. The author examines the history of military contempt powers and traces their influence on article 48 of the Uniform Code of Military Justice. After an examination of constitutional issues involved, he proposes several changes to remedy present weaknesses in the power of military courts to maintain order.

Unless order is maintained in the courtroom and disruption prevented, reason cannot prevail and constitutional rights to liberty, freedom and equality under law cannot be protected. The dignity, decorum and courtesy which have traditionally characterized the courts of civilized nations are not empty formalities. They are essential to an atmosphere in which justice can be done.[1]

I. INTRODUCTION

These are tumultuous times. These are times of dissent and discord. Times when the most basic of our values and the most sacrosanct of our institutions are being questioned, challenged and tried. The values and institutions that will ultimately survive are those that can withstand the questions of reason and the challenges of truth, but none can survive anarchy. The courts of law have not escaped the incursion of the tumult. The news media are rife with reports of trials being disrupted by disorder. The events of the trial of the "Chicago 7" are too well known to bear repetition, and now we read of the "Seattle 8":

> [The U.S. District Court Judge] ordered one spectator ejected and 10 others followed, yelling, "Youth cannot get a fair trial in this court," and "Heil Hitler."
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> . . . .

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[1] *Report and Recommendations of the American College of Trial Lawyers, Disruption of the Judicial Process,* CASE & COM. 28 (Sept.-Oct. 1970).

> Earlier, Jefferey Dowd, a defendant yelled at U.S. Attorney Stan Pitkin, "I'll shoot to kill the next time an agent comes to my house and I'll bring him right to you."
> Dowd shook his fists and pointed his finger at Pitkin when the government denied federal agents were keeping the defendants and their attorneys under surveillance.
> . . . .
> Dowd screamed that his girl friend was afraid to live at home because FBI men were around the house.[3]

The military courts have not been immune from the tumult. The Presidio Mutiny cases engendered a good deal of newspaper space for the disruption surrounding them. But it is not only the well publicized trial that earns the rancor of the unruly. A special court-martial at Fort Eustis experienced difficulties:

> Before the dismissal, several witnesses in the case held up court proceedings for almost an hour by defying [the military judge's] order that they leave the courtroom until called to testify.
> After the witnesses were called to the bench several spectators, including Mrs. Steven P. Wineburg, whose husband, an Army private, was convicted last month on similar charges, gathered around Blue. [The military judge.]
> Blue then ordered the military policeman to ensure that those not testifying would remain outside the courtroom and had several spectators removed.[3]

Nor is the problem new in either the civilian courts or the military.[4] A professor at the University of Virginia Law School in 1838, explained the reasons courts are subject to contemptuous behavior:

> Whilst the judiciary is the weakest branch of all governments, its duties from their very nature, are peculiarly calculated to arouse the angry passions of the discontented and turbulent, and to excite them to acts of outrage, disobedience and insult.[5]

In an effort to discover the extent to which courts-martial had been experiencing difficulty with disruptive behavior, and the manner in which military judges had been dealing with the problem, the author conducted a survey of seventy-five general and special courts-martial military judges during the months of November through December 1970.[6] All judges were assigned to

[3] The Washington Post, Nov. 26, 1970, at A26, col. 1.
[3] Richmond Times Dispatch, Nov. 5, 1970, at C–12.
[4] One of the earliest reports of contempt procedure is found in a treatise written by First Lieutenant Stephen Payne Ayde, Judge Advocate to General Thomas Gage, the British Commander at the time of the American Revolution. S. AYDE, A TREATISE ON COURTS-MARTIAL 67–69, 72 (1st ed. 1769).
[5] DAVIS, CRIMINAL LAW, 389 (1838).
[6] Trial Judiciary Officer Station List of General and Special Court-Martial Military Judges, 1 Jun. 1970.

the trial judiciary and representatives of all judicial areas and circuits were contacted. Of the forty-four officers who responded, sixteen had had experience as law officers prior to being certified as military judges. Altogether these men had tried over ten thousand general courts-martial and over fourteen thousand special courts-martial. Nearly all of the officers had experienced some form of contempt in their court-rooms, but based on the number of times this had happened, the experience with such behavior had been very small. The significant reply, however, was that although contempt had been almost infinitesimal in the past, the incidence of contemptuous behavior in courts-martial had been on the rise since about mid-1970. A sampling of the acts described which the judges considered to be contemptuous were refusal of the accused to appear in military uniform; failure of military personnel to testify when ordered to do so; reference to the trial as "these illegal proceedings" while continually interrupting the trial; sarcastic and scornful behavior to counsel and the judge, and refusal to participate further in the conduct of the trial; disrobing in the court-rooom during the trial by the accused; continued argument on a point after an adverse ruling thereon; vulgarity and obscenity; an accused tearing off his ribbons and throwing them across the court-room; failure of stockade and company personnel to have an accused ready for trial; disobedience to court's instructions on what evidence could be admitted by counsel; intoxication; tardiness of a witness or counsel; communication of a threat to a witness; disruption of trials by spectators; prevention of the testimony of a young girl by the act of her mother in screeching, shouting, sobbing and simply overbearing any attempt to swear and examine the witness; failure by counsel to appear in court; an accused trying to fling himself out a second story window; and feigning of mental illness.

The problem of contemptuous behavior before courts-martial clearly exists. It has been stated that courts must have "competent authority to repress such acts, to protect themselves . . . and to give due efficacy to their lawful powers. . . ." [7] Do courts-martial have this competent authority? Let us begin to find the answer to this inquiry by tracing the history of the present law.

II. THE HISTORY OF MILITARY CONTEMPT LAWS

> Further yet, for preserving Order, and keeping up the Authority of those Courts, it is also appointed, That if any Officer or Soldier,

[7] DAVIS, *supra*, note 5.

> shall presume to draw his Sword in any Place of Judicature, while the Court is sitting, he shall suffer an arbitrary Punishment: And the Provost Martial is there empowered and directed by his own Authority to apprehend such Offenders . . .
> The like also with Respect to using any braving or menacing Words, Signs or Gestures. . . .[8]

The above reference appears to be one of the very earliest pronouncements on the problem of the contempt of a military court. Although the author does not identify his source, it is strikingly similar to Articles 66 and 73 of the Prince Rupert[9] Code.[10] Writing in 1898, George B. Davis traced the Articles' evolution into American military law:

> With a slight verbal change, this provision [Article 73] appears as Article 16, Section 15 of the British Code of 1774. . . .
> With [an insignificant] substitution . . . it appears as Article 14, Section 14 of the American Code of 1776.[11]

The original rules and Articles of War enacted by Congress 20 September 1776, as Section XIV, Article 14 provided:

> No person whatever shall use menacing words, signs, or gestures, in the presence of a court-martial, then sitting, or shall cause any disorder or riot, so as to disturb their proceedings, on the penalty of being punished at the discretion of the said court.[12]

The Articles of 1786 were twice re-enacted and on 10 April 1806, the contempt article became Article 76 of the Articles of War.

> No person whatsoever shall use any menacing words, signs, or gestures in presence of a court-martial, or shall cause any disorder or riot, or disturb their proceedings, on the penalty of being punished at the discretion of the said court-martial.[13]

At the time the Constitution and the Bill of Rights were being debated and enacted the scope of Federal military law was

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[8] BRUCE, THE INSTITUTIONS OF MILITARY LAW, ANCIENT AND MODERN 309 (1717).

[9] Prince Rupert (called Rupert of the Rhine, or of the Palatinate) (1619-1682), was a royalist cavalry commander in the English Civil War (1642-1645). He became General of the King's Army (Charles I) in 1644. 19 ENCYCLOPAEDIA BRITANNICA 669 (1965).

[10] G. DAVIS, MILITARY LAW OF THE UNITED STATES, 507 (1st ed. 1898). Winthrop states that this became Article 54 of the Code of James II. W. WINTHROP, MILITARY LAW AND PRECEDENTS 301 (2d ed. 1920).

[11] G. DAVIS, *supra* note 10, at 507–08.

[12] CALLAN, MILITARY LAWS OF THE UNITED STATES RELATING TO THE ARMY, VOLUNTEERS, MILITIA, AND TO BOUNTY LANDS AND PENSIONS FROM THE FOUNDATION OF THE GOVERNMENT TO THE YEAR 1863, 73 (2d ed. 1863).

[13] *Id.* at 189.

exceedingly limited. It applied to a mere handful of individuals all of whom were soldiers or sailors by choice (there being no National Draft Act until the Civil War). President Washington transmitted to the Senate in August 1789, a statement from Secretary Knox showing that the troops in active service came to 672, and that there were wanting 168 to complete the establishment.[14]

Article 76 of the Articles of War of 1806 became Article 86 in 1897 with a slight change in wording.[15]

In the next revision in 1916, the contempt article became Article 32 which stated:

> A court-martial may punish at discretion, subject to the limitations contained in Article fourteen, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder.[16]

Article 14, referred to in the above quotation, dealt with the general limitations on who may be tried by a summary court-martial and set the limits of punishment for the summary court.[17] The reference to Article fourteen is somewhat puzzling. Insofar as a contempt proceeding is not a trial,[18] the reference as to who may be tried by a summary court-martial is not germane. It more likely has reference to limiting the punishment to that the summary court could mete out. This theory is reinforced by the fact that when a limitation was set in the contempt article itself, this reference no longer appeared. Article thirteen of the then Articles of War limited the jurisdiction of special courts-martial, but it was not mentioned.[19] The limitation on punishment in the contempt article first appeared in the Articles of War in 1921, when Article 32 was again amended to read:

> A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence or who disturbs its proceedings by any riot or disorder: Provided, that such punishment shall in no case exceed one month's confinement, or a fine of $100, or both.[20]

The rules for the government of the Navy were separate at this time. In fact the first complete military codes under the

[14] Wiener, *Courts-Martial and The Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 8 (1958).
[15] THE MILITARY LAWS OF THE UNITED STATES, 492 (1897).
[16] THE MILITARY LAWS OF THE UNITED STATES 1915, 592 (5th ed. 1917).
[17] *Id.* at 584.
[18] United States *v.* Sinigar, 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1955).
[19] THE MILITARY LAWS OF THE UNITED STATES, *supra* note 16 at 584.
[20] MILITARY LAW OF THE UNITED STATES 1921, 1464 (6th ed. 1921).

Constitution were those for the Navy in 1799 and 1800, followed by the code for the Army in 1806. The earliest article on contempt for the Navy was Article XXXVII of the Rules and Regulations for the Government of the United States Navy which provided:

> . . . [I]f any person shall . . . behave with contempt to the court, it shall and may be lawful for the court to imprison such offender at their discretion; provided that the imprisonment shall in no case exceed two months. . . .[21]

The Navy article apparently changed only once again, becoming Article 42(a) in 1878:

> Whenever any person refuses to give his evidence or to give it in the manner provided by these articles or prevaricates, or behaves with contempt to the court, it shall be lawful for the court to imprison him for any time not exceeding two months: Provided, that the person charged shall, at his own request but not otherwise, be a competent witness before a court-martial or court of inquiry, and his failure to make such request shall not create any presumption against him.[22]

Thus Congress had Article 32 of the Articles of War and Article 42(a) of the Articles for the Government of the Navy before them when holding hearings on the Uniform Code of Military Justice in 1949.[23] The product of their labors was Article 48:

> A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.[24]

Article 48 remained unchanged by the Military Justice Act of 1968[25] despite the fact that the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army in January 1960, proposed its amendment by inserting between the words: "a court-martial" and "provost court" the phrase: ". . . a law officer conducting special sessions pursuant to subsection 839(a) of this title (article 39a). . . ."[26]

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[21] MALTBY, COURTS-MARTIAL AND MILITARY LAW 262 (1813).
[22] NAVAL COURTS AND BOARDS 1937, 466 (1945).
[23] Office of the Secretary of Defense, Committee on a Uniform Code of Military Justice, Comparative Studies Notebook, A.W. 32, p. 1 (1949).
[24] UNIFORM CODE OF MILITARY JUSTICE, Art. 48 (hereafter cited as UCMJ).
[25] Public Law 90–632 (82 Stat. 1335).
[26] Report to the Honorable Wilber M. Brucker, Secretary of the Army by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, 124 (1960).

In summation, there is very little difference between the original Article 14 of 1776 and Article 48 of today's Code.

A comparison with Article 42(a) of the Articles for the Government of the Navy is a bit more difficult insofar as that article was more inclusive than either Article 14 or Article 48. It included among its prohibitions refusal to give evidence or to give it the manner provided by those articles. These acts are now proscribed by Article 47 of the UCMJ as to persons not subject to the Code and by Article 134 of the UCMJ as to persons who are subject to the Code.[27] Article 42(a) further included perjury, now proscribed by Article 131 of the UCMJ as to persons subject to the Code. Lastly, the Naval article assured the competency as a witness of the person convicted under its terms. This is now resolved in paragraph 148*d* of the revised 1969 *Manual for Courts-Martial*.[28]

Comparing Article 42(a) with either Article 14 or Article 48 solely on the basis of the contempt power shows significant differences. Its application will show even more.

III. THE CONSTRUCTION OF ARTICLE 48

Inasmuch as the Army's past and present articles on contempt are strikingly similar, in construing the present article reliance can be placed on the authorities who have construed its predecessors. Due note will be made of the divergent construction placed upon the Navy Article.

A. "*A COURT-MARTIAL, PROVOST COURT, OR MILITARY COMMISSION . . .*"

Two crucial questions concern the jurisdiction of a court-martial [29] to punish for contempt one who is superior in rank to

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[27] 12 DIG. OPS., *Witnesses*, sec. 39.11. United States *v.* Riska, 33 C.M.R. 939 (AFBR 1963), DIG. OPS. JAG 1912 para. LXII D, at 149 (Apr. 1880).

[28] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV.), para. 148*d* (hereafter cited as MCM, 1969). "Conviction of an offense does not disqualify a witness but certain convictions may be shown to diminish his credibility. See 153*b* (2) (*b*)."

[29] Since the focus of this inquiry is the contempt power of the court-martial, the provost court and the military commission will be discussed only where their proceedings have a direct bearing on the contempt power of the court-martial.

The following colloquy took place during the Senate Hearings on Article 48 in 1949:

"*Mr. Brooks.* I would like to ask one question. It is going back, and I think it has been covered, but I did not fully understand it. Exactly what is the definition of a provost court?

any member of the court or the military judge, and to punish one who could not be punished by the particular court, *e.g.* an officer witness before a summary court-martial.

Paragraph 10 of the *Manual for Courts-Martial, United States, 1969 (Revised)*, grants blanket jurisdiction to a court-martial in these words:

> A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder (Art. 48). See 118 (Contempts).

Paragraph 118 of the Manual provides "The power to punish for contempt is vested in general, special, and summary courts-martial." The paragraph further defines the words "any person" as used in Article 48 of the Uniform Code of Military Justice to include all persons; hence any court-martial, general, special or summary has the power to punish for contempt whether or not the contemnor is superior in rank or not otherwise amenable to the particular court's jurisdiction.

But this view has not always been universally held by commentators on the question. An examination of their view will be helpful in understanding the reasoning behind the present solution.

W. C. DeHart, one of the earliest commentators to discuss the

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Mr. Larkin. Well, I suppose the name itself is derived from the Provost Marshal's Department, which is generally the Department that controls the military police.

Mr. Brooks. How does that differ from a court-martial?

Mr. Larkin. Well, a provost court, like other military commissions and tribunals which are usually used in occupied territories and which are the creatures of the occupying authority, is operated in accordance with whatever rules are prescribed for them. Many of the military or provost courts, for instance, that operate in occupied territories will follow, to a large extent, the court-martial procedures, but they may specifically apply the local law.

In many recent cases in occupied territory they have followed the procedures of court-martial, but specifically they applied the German law. They are ad hoc special courts for a special purpose. . .

Mr. Brooks. Are they not intended to cover the civilians?

Mr. Larkin. Civilians who are not subject to the code.

Mr. Brooks. Civilians who are not subject to the code. Is that right Colonel?

Colonel Dinsmore. It is for the trial of civilians for the occupied territory".

Index and Legislative History, Uniform Code of Military Justice, Judge Advocate General, U.S. Navy 1061 (1950).

question of superiority of rank of the contemnor, cited the case of Major Jack Browne of his majesty's 67th regiment, a court-martial in Antigua in 1786. There the principle was enunciated that all legally constituted courts-martial can punish for contempt no matter what the rank of the members of the court in relation to the contemnor.[30] DeHart went on to point out that this was true regarding general courts but not courts excluded from taking cognizance of offenses by commissioned officers.[31] This misconception of the power of the inferior courts to punish officers was explained by Lieutenant Colonel Winthrop in his celebrated Military Law and Precedents:

> Some of the authorities indeed . . . have expressed the opinion that a regimental or garrison court was not empowered to proceed for a contempt against an officer, although it could do so against an enlisted man. This opinion is founded upon the provision of the code, that such a court shall not try a commissioned officer. But here the distinction is lost sight of between a trial and a proceeding for contempt, the latter not being a trial, but a summary assertion and enforcement of executive authority. Thus an officer who is by his conduct before an inferior court, as a witness or otherwise, is guilty of a contempt, may be as legally subjected to the punishment provided by the Article as may a soldier, and as properly as he may be before a general court.[32]

While the Army under its Articles of War adopted Winthrop's reasoning in extending the power to inferior courts, the Navy did not.[33] The two services continued their divergent views as to the jurisdiction of the inferior courts to punish for contempt until the studies began on the proposed Uniform Code of Military Justice. Then the Navy joined the Army and adopted the views of the Keefe and McGuire reports that the power is given to general and summary courts-martial and courts of inquiry.[34]

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[30] DEHART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL, 104 (1862).

[31] *Id.* at 105. The view that only general courts-martial could punish officers for contempt was shared by another commentator of the period:

> Courts-martial have the authority to arrest a contemnor whatever his rank, but only general courts have the power to punish an officer. Contempts in regimental and garrison courts-martial have only the power to arrest and refer to the proper authority. BENET, MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL, 37 (6th ed. 1868).

[32] WINTHROP, *supra*, note 10, at 302.

[33] Authority of naval courts to punish contempts—

> The 40–2d A.G.N. gives a court authority to punish contempts. The article is not construed as extending the authority to punish for contempt to a summary court-martial or court. NAVAL COURTS AND BOARDS 1937, 181 (1945).

[34] Office of the Secretary of Defense, Committee on a Uniform Code of Military Justice, Comparative Studies Notebook. A.W. 32, p. 3 (1949).

Since the adoption of the present Article 48 and its implementation by paragraph 118 of the Manual for Courts-Martial, there has been no evidence that the power does not extend to all classes of courts-martial.

Another consideration in the construction of the phrase "A court-martial, provost court, or military commission . . ." is whether the court is empowered to act, if a contemptuous act is committed prior to the court's being sworn. Winthrop was of the opinion that it was:

> . . . [I]t is not essential that [a court-martial] should be *sworn* for the trial for which it has assembled. It cannot indeed proceed to *trial* without the additional qualification of an oath, but, as already remarked, the proceeding for a contempt is not a trial. Thus, before the oath is taken by which the organization for the trial is completed, the court is as fully empowered to pass upon and punish a contempt as it is subsequently.[34]

Winthrop then cites two early approvals of such a course of action. One approval occurred in the case of Private Shalon of the 7th U.S. Infantry in 1844, by The Judge Advocate General. The second was promulgated in General Court Martial Order number 36 of 1870, and had the approval of the President. No subsequent mention of this situation has been found in later discussions and it seems that once we adopt the finding that a contempt proceeding is not a trial, the logic is irrefutable.

Paragraph 118 of the Manual specifically states that the military judge when trying the case alone has the power to determine whether to hold a person in contempt.

An interesting historical sidelight to this paragraph is that on 18 January 1960, a committee of general officers recommended that the Code be amended to provide for a general court to be convened without the presence of members for motions and trials and further that Article 48 be amended "by inserting between the words 'a court-martial' and 'a provost court' the following: 'a law officer conducting special sessions pursuant to subsection 839(a) of this title (article 39a) . . . .'" [35] The drafters of the Military Justice Act of 1968 did not heed this suggestion but insofar as Article 16 of the Code defines one type of court-martial as one composed of only a military judge, there seems to be no real question that a court composed of a military judge alone has the power to punish for contempt. This fulfills the committee's expectation that "in any proceeding which the law

[34] WINTHROP, *supra*, note 10, at 302–303 (emphasis supplied).
[35] Report to the Honorable Wilber M. Brucker, *supra*, note 6, at 124.

officer is authorized to conduct without the presence of members, he should have the equivalent powers to maintain the order and dignity of the proceedings."

This power was one that the committee felt the law officer should also have in a pre-trial session called for the purpose of settling questions of law and for inquiring into the providency of the accused's plea before the members of the court are required to be present.[37]

Does the military judge in fact now have that power in an Article 39(a) session? Insofar as Article 39(a)(2) provides that:

> [T]he military judge may, . . . call the court into session without the presence of the members for the purpose of—
>
> . . . .
>
> (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court . . . .[38]

It would appear that had the accused already made a request for trial by the military judge there would be no problem in the military judge proceeding to determine his appropriate action. In fact the question as to his power to punish for contempt in an Article 39(a) session would be mooted insofar as after he had approved the request for trial by military judge alone, he should announce that the court is assembled and proceed with the trial of the case.[39]

As will be noted in the discussion of the procedure of punishing for contempt in Chapter IV, the military judge sitting with members of a court-martial can make only a preliminary ruling as to whether a person should be held in contempt. He then must instruct the court as to the standards by which his determination was made and must ask the court whether any member has an objection to his ruling. The court under appropriate instructions then makes the final determination as to whether to punish for contempt and the punishment itself. The question may arise then as to punishing for a contempt committed during the Article 39(a) session preceding a court-martial at which there will be no members? This should present no problem. When the military judge calls the court into session pursuant to Article 39a, he is then the court-martial and any contempt committed before him

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[37] *Id.* at 107–108.
[38] UCMJ Art. 39(a).
[39] MCM, 1969, para. 53*d*(2)(c).

at that session can be handled as if he were trying the case without members.

B. ". . . *MAY PUNISH FOR CONTEMPT . . .*"

Winthrop points out that these words are not mandatory, that the court is authorized, but not required to punish.[40]

> Thus it is always open to the court to *waive* the right of proceeding under the Article, and instead, to prefer charges against the offender, through its president or judge advocate, or to report the facts to the proper commander for his action. In the majority of cases in our service this course has in fact been pursued. Except, however, where the offence committed is of a peculiarly grave character, demanding a severe punishment, and one not appropriate to the action under consideration, it will be the preferable course, and indeed in general the duty of the court, to proceed summarily under the Article.[41]

Winthrop was of course construing Article 86 where the phrase under consideration was ". . . may punish at discretion . . ."[42] where the punishment limitation of 30 days confinement or a fine of $100 or both did not exist; hence his allusion to prosecuting an offence . . . of a peculiarly grave character, demanding a severe punishment" under the Article. Dealing now with a limited punishment, we can reverse our tack when we find ourselves dealing with a contempt deserving of more severe punishment and prefer charges under another Article of the Code. It is the opinion of The Judge Advocate General that the limit of punishment set for contempt of court does not apply where the offense is prosecuted by the preferring of formal charges and specifications for the act which constituted the contempt.[43]

Another difference noted is that according to the survey of military judges conducted by the author, the majority of cases today are not handled either under the article or by preferring charges, but by admonition and if that fails, banishment from the court-room.[44] The reasons for this method of "punishment" will be made more apparent under the discussion following on the procedure involved in punishing for contempt. The expelling of the contemnor from the court room will also be discussed at greater length in Chapter VI, on alternative measures of dealing with contemptuous conduct.

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[40] WINTHROP, *supra*, note 10, at 308 (emphasis supplied).
[41] *Id.*
[42] *Id.*
[43] DIG. OPS. JAG 1912–1940 sec. 389 (A.W. 32) Contempts (1942).
[44] *See* note 6, *supra*.

C. ". . . ANY PERSON . . ."

The manual for Courts-Martial provides:

> The words "any person," as used in Article 48 include all persons, whether or not subject to military law, except the military judge and the members of the court.[44]

There has never really been any question that persons subject to the Code or the precedent Articles of War would be subject to the contempt power of the courts-martial. Similarly the ruling that the military judge and the court-members are not subject to the power is of early date. The Secretary of War held in 1850 in the case of a Lieutenant Colonel Backensots, that a court-martial had no power to punish its own members.[45] Winthrop has an interesting comment on this case:

> In a case of this character, therefore, the proper course . . . would in general be for the court to adjourn and at once report the facts to the convening authority (with a formal charge preferred, if deemed desirable) with a view to having the offending member brought to trial for conduct prejudicial to good order and military discipline.[46]

The modern debate about this portion of the Article has centered on whether the term "any person" included civilians. As will be recalled, the earlier versions of Article 48 used the term "No person whatsoever." DeHart, one of the early commentators, discussed the wording of Article 76 in 1862:

> . . . [T]he word *whatsoever* evidently intended to subject every person . . . to the discretionary action of a court-martial . . . and yet, when it is remembered, that the language of the article was borrowed from the military institutes of a foreign nation, in which the sovereign, one branch only of the legislative power, was authorised to make regulations, or "articles of war," for the better government of the military forces, it would seem that the law is not binding on the citizens of the country generally, or on any others than those belonging to the military society.
>
> But the law, as it exists in this country, does not flow from any delegated or inferior authority, but proceeds directly from the highest source of legislation—the Congress of the United States, and, in this particular, materially differs from its prototype: yet the object of this law was, as in England, for the better government of the military establishment, and thence comes the doubt as to the competency of courts-martial to exert their authority to arrest, or punish persons in civil life. . . . As courts-martial have no appointed means of enforcing their mandates against persons in civil

[44] MCM, 1969, para. 118a.

[45] DIG. OPS. JAG 1912 *Articles of War* para. LXXXVI A E2, at 162 (Oct. 1863).

[46] WINTHROP, *supra*, note 10, at 307.

> life, supposing the power to make such mandates to exist, a procedure against such would be nugatory and vain: and yet, it may be asked, shall disturbances of the proceedings of courts-martial by persons not belonging to the military community be permitted pass with impunity? [48]

After casting grave doubt on whether the power to punish civilians does in fact exist, DeHart then suggests removing civilian offenders from the limits of the post, or if the court not be held on a post, putting them out of the courtroom. Should a further offense occur DeHart suggested an appeal to the civil authorities to proceed against the offenders for a breach of the peace. As to how far the civil courts should go, he gives no opinion.[49]

Benet, the next commentator in point of time, favored broad contempt powers over civilians in theory, but ran afoul of the same practical enforcement problems as DeHart.[50]

Ives, the next commentator, acknowledged the position taken by DeHart and Benet but berated them for their timorous attitude.

> This mild view of the power of a court-martial to maintain order in its presence does not seem consistent with the dignity of a judicial body. Courts-martial are as competent, in cases within their jurisdiction, as any other court. . . . Punishment by imprisonment would seem appropriate in the case of grave contempts before court-martial.[51]

Colonel Winthrop sums up these conflicting views, then states the rationale of the courts-martial power to punish civilians for contempt.

> In the opinion of the author, a court-martial, while empowered of course to cause a disorderly civilian to be ejected from the court-room, is also empowered, under the comprehensive terms of Art. 86, to punish, for a direct contempt, by fine or imprisonment, any such civil person, whether witness, clerk, reporter, counsel, or a mere spectator at the trial, with the same legality as it may an officer or soldier of the army. The enforcing of the Article in the instance of a civil person is not an exercise of military *jurisdiction* over him. He is not subjected to trial and punishment for a military offense, but to the legal penalties of a defiance of the authority of the United States offered to its legally-constituted representative.[52]

However, after taking a firm stance in favor of the power of the court-martial to punish a civilian and decrying the futility of merely expelling him, Winthrop too recommends appealing to

[48] DEHART, *supra*, note 30, at 106–108.
[49] *Id.* at 108.
[50] BENET, *supra*, note 31, at 37–38.
[51] IVES, A TREATISE ON MILITARY LAW, 147 (1879).
[52] WINTHROP, *supra*, note 10, at 306 (emphasis supplied).

the civil courts for relief. Apparently Winthrop did not convince the next commentator of the court-martial's power. Edgar S. Dudley, writing in 1910, was of the opinion that the power applies to any person in the court including civilians, but only such civilians as are subject to military jurisdiction. (A limited, if not non-existent class in 1972.) He further recommends that a civilian not subject to military mandate should be removed from the court and the garrison and be barred from returning, but that only civil courts should punish them for contempt.[53]

The only reported finding of contempt against a civilian in a court-martial appears in a Navy case [54] where a retired Navy enlisted man appeared as civilian counsel for an accused in a court-martial. The court-martial adjudged the attorney in contempt when he appeared before them intoxicated "thereby interrupting the proceedings of the court without justifiable cause." The court-martial did not punish him for contempt, but ordered that he be precluded from further attendance on the court. The Navy department advised that disciplinary action could have been taken under Article 42(a) of the Articles for the Government of the Navy.[55] The order also cited the Naval Reserve Act of 1925, section 10, which stated that retired Naval personnel are at all times subject to the laws for the Government of the Navy.[56] It is somewhat difficult to determine whether the contempt punishment was imposed on a civilian or on a Navy retired person.

The power of the court-martial to punish civilians for contempt arose during the hearings on the Uniform Code of Military Justice. The chairman of the subcommittee of the House Armed Services Committee offered the following commentary on proposed Article 48.

> This article is derived from A.W. 32. The proposed A.G.N. article 35 would require contempts by persons not subject to this code to be tried in civil courts. It is felt essential to the proper functioning of a court, however, that it have direct control over the conduct of persons appearing before it.

After which the subject was discussed:

> Mr. Chairman, I think that there are two things that should be

[53] DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL, 36 (3d Ed. 1910).

[54] 2 Navy Dept. Compilation of Court-Martial Orders, 1915–1937, Ct. Martial Order No. 4–1933, p. 12 (1941).

[55] *See* note 22, *supra*.

[56] The order concluded with this sanction. The Attorney shall be notified that the Secretary of the Navy directs that he shall not represent any one else before a naval court-martial without first filing evidence that no fee will be charged by him either directly or indirectly for each such appearance.

clarified for the record here. One is that this section contemplates the right to punish for contempt civilians who may be testifying or appearing as counsel in a court-martial case. . . .

Mr. Rivers. Civilians?

Mr. Smart. That is correct.

Mr. Rivers. Not subject to it?

Mr. Smart. When civilians come before a court-martial they must be bound by the same rules of decorum as the other people before it.

Mr. Brooks. Is the Federal rule 30 days or 10 days?

Mr. Larkin. I think it is 30.[87] The present article of war from which this was drawn for 30 days. That is article of war 32. Also a $100 fine. It is exactly the same.

Mr. Brooks. Well, it is substantially the same rule that you have in the Federal criminal courts?

Mr. Larkin. And the same rule that we have in the Articles of War right now.

Mr. Brooks. Yes.

Mr. Larkin. It is designed to operate in the court's presence. If the court-martial cannot conduct its proceedings in an orderly quiet way it just cannot get to the issue, and you cannot in a contemplative manner decide what is right and what is wrong. Unless it has the power to discipline those before it you may have the most erratic kind of proceedings, and the most disturbing circus atmosphere, as you very frequently have in some sensational civil cases. If the court cannot operate its own proceedings in a dignified manner its proceedings become intolerable.

Mr. Brooks. Is there any appeal from this?

Mr. Smart. There is none. There is a limited punishing power and there is no appeal. It is a summary citation for contempt.

Mr. Brooks. This is 30 days for each successive of each offense, plus the fine of $100?

. . . .

Mr. Brooks. Is there any objection to article 48? There is no objection.[88]

There were no reported discussions of Article 48 before the Senate subcommittee. The question of the courts-martial's power to punish a civilian for contempt was not in doubt in the House subcommittee. Therefore, it would appear that absent any statutory amendment or decision to the contrary by the United States Supreme Court or the United States Court of Military Appeals, there should be no doubt in the minds of military judges or members of courts-martial that the power exists. In fact, two decisions of the United States Court of Military Appeals have urged the use of the contempt power when dealing with civilians.

[87] Mr. Brooks and Mr. Larkin are both wrong here. Rule 42(a) of the Federal Rules of Criminal Procedure sets no limit as to the punishment that may be imposed for criminal contempt.

[88] Index and Legislative History, Uniform Code of Military Justice, Judge Advocate General, U.S. Navy (1950) at 1060–1061.

United States v. *DeAngelis* [59] involved a civilian defense counsel and *United States* v. *Cole*,[60] a civilian witness.

The commentators who have written on the subject since the enactment of the Uniform Code of Military Justice acquiesce in the view.

> Special and general courts-martial are empowered to enforce contempt proceedings against counsel, civilian or military, and the respective Departments through their Judge Advocates General may disqualify or suspend any counsel from practice before courts-martial.[61]

> There are three offenses for which a court-martial may try any person, even though in all other respects such persons are not in any other manner subject to the code. These are aiding the enemy, spying, and contempt of court-martial by menacing words, signs or gestures in its presence, or by disturbing its proceedings by any riot or disorder.[62]

The military judges themselves seem to have little doubt that the power exists. Twenty-nine of the thirty-one military judges responding answered that the power did in fact exist. One thought it would be stricken down by the Supreme Court on the ground that it was violative of its rulings concerning jurisdiction over civilians, and the remaining judge frankly admitted that he did not know. But nearly all of those answering in the affirmative stressed that there were many problems involved when it came to enforcing punishment against civilians.[63] Also there was some hesitancy on the part of those military judges presiding overseas to use the power against foreign nationals.

D. ". . . *WHO USES ANY MENACING WORD, SIGN OR GESTURE . . .*"

This section, which is certainly at the heart of the article, has been little discussed by the commentators. Insofar as the proceeding of contempt is not appealable,[64] there has been no construction of the meaning of this phrase. The Manual itself

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[59] United States *v.* DeAngelis, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).
[60] United States *v.* Cole, 12 U.S.C.M.A. 430, 31 C.M.R. 16 (1961).
[61] Comment, *Civilian Counsel Under the Uniform Code of Military Justice*, 1 CATH. U. OF AMERICA L. REV. 81 (1951).
[62] AYCOCK AND WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE, 65 (1955). The authors' imprecise use of the word "try" and the incorrect grouping with the offenses of aiding the enemy and spying are unfortunate in that the question posed in Reid *v.* Covert, 354 U.S. 1 (1957), as to jurisdiction over civilians, is again raised.
[63] *See* discussion on punishments, *infra*, § III G.
[64] MCM, 1969, para. 118*b*.

just glosses over these words by referring to them as, "The conduct described in Article 48. . . ." [65] This problem was explored in a thoughtful article by Navy Commander Ochstein:

> "Contempt of court" is defined generally as the commission by a person of any act in willful contravention of its authority and dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking he has been given. However, it is an elementary hornbook rule that criminal statutes must be strictly construed and Congress in enacting Article 48 has defined and limited contempts in the military to any "person who uses menacing words, signs, or gestures in its presence or who disturbs its proceedings by any riot or disorder." The question therefore arises, does the statute authorize punishing as contempt, action which is disrespectful rather than menacing or conduct which is short of a riot disorder? [66]

Commander Ochstein then reviews the legislative history of the present Article 48, especially the statement by Mr. Larkin [67] that "[i]f the court cannot operate its own proceedings in a dignified manner its proceedings become intolerable," and concludes that it was the legislative intent to provide broader coverage than was actually enacted into law as Article 48.[68] He also cites Colonel Winthrop's criticisms of the language:

> "Who uses any menacing words, signs, or gestures, in its presence." This phraseology is unsatisfactory: the employment of the single descriptive term "menacing" having the effect of excluding from the cognizance of the court, under the Article, the use, in its presence, of improper words etc. which yet do not express or involve a threat or a defiance. Thus language, however disrespectful, if it be not of a minacious character, cannot, unless actually amounting to or creating a *disorder*, in the sense of the further provision of the Article, be made the occasion of summary proceedings and punishment as for a contempt—a defect certainly in the statute.[69]

In practice courts-martial have never been too circumspect about the strict construction found necessary by Ochstein and Winthrop. Several cases have indicated a willingness to characterize the unruly and disrespectful with the minacious. An accused in an 1871 case was asked by the judge advocate whether

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[65] *Id.*, para. 118*a*.
[66] Ochstein, *Contempt of Court*, 16 JAG J. 25, 26–27 (1962).
[67] *See* note 58, *supra*.
[68] Ochstein, *supra*, note 66, at 27.
[69] WINTHROP, *supra*, note 10 at 307 (emphasis supplied).

he had a statement to make to the court. He replied "I'll be God Damned if I have any statement to make," and left the courtroom abruptly without authority.[70] Such conduct was held contemptuous.

More recently the behavior of the civilian defense counsel in *United States* v. *DeAngelis*[71] reflected both disrespectful and threatening conduct:

> LM: Sonaglia was here the last few days. Why didn't you put him on the stand, Mr. Carroll?
> DC: Are you asking that question in sincerity or trying to be funny?
> LM: I am asking it sincerely and I never try to be funny. You have had him three days . . . .
> DC: You want to know why I didn't put him on the witness stand?
> LM: You keep asking for him continually.
> DC: Have you ever tried a case? That is the most absurd question I have heard of. You want to know why I didn't put him on the witness stand? Any first year law student would know that. . . ."
> [I]f you ever pronounce judgment on this accused without power to produce the witnesses, you will, each and every one, be held civilly liable."[72]

But never once in the court's exposition on the power of the law officer to punish for contempt did it use the terms required by the Article, ". . . any menacing word, sign, or gesture . . . or who disturbs its proceedings by riot or disorder." The court spoke of "grossly insulting provocative language"; "deliberately contemptuous tirades"; "a course of conduct designed solely to delay and hinder the completion of the trial"; "obstructive and abusive actions of counsel which flouted the authority of the law member, made a mockery of the requirement of decorous behavior, and impeded the expeditious, orderly and dispassionate conduct of the trial"; and "such flagrantly contemptuous conduct". None of the facts stated by the court to justify the use of Article 48, it is submitted, meet the requirements of the Article.

A similar confusion over the scope of Article 48 was evidenced in *United States* v. *Cole*.[73] The civilian victim in a rape case refused to answer questions of the defense counsel on cross-examination relating to her marital difficulties and her previous

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[70] G.O. 17, Dept. of the Columbia, 1871, as cited, *id.*
[71] United States *v.* DeAngelis, 3 U.S.C.M.A. 293, 12 C.M.R. 54 (1953).
[72] *Id.* at C.M.R. 59.
[73] *Id.* at C.M.R. 58–59.
[74] *Id.* at C.M.R. 60.
[75] United States *v.* Cole, 12 U.S.C.M.A. 430, 31 C.M.R. 16 (1961).

immoral conduct. The law officer referred the case to the convening authority for instructions on whether to proceed. On review, the Court of Military Appeals said:

> Had the law officer taken a firm position at the beginning of the controversy and insisted that the witness answer, she might well have complied with his directions. We recommend that law officers of general courts-martial not hesitate to employ the powers conferred upon them by Congress in order that military trials may proceed in a fair and orderly manner. See Code, *supra*, Articles 47, 48, 10 U.S.C. §§ 847, 848, and United States *v.* DeAngelis, 3 USCMA 298, 12 CMR 54. While instances such as here depicted are fortunately rare, institution of contempt proceedings should serve wholly to eliminate them.[76]

This was clearly a case of a refusal to testify, apparently without any disorder. Why then, did the Court cite Article 48 and *DeAngelis*, neither of which relate to the refusal to testify? Perhaps the Court was attempting to strengthen the position of the law officer as a federal judge in pointing out all of the military contempt power.[77]

E. "... *IN ITS PRESENCE* ..."

Turning once again to the Manual for guidance, we find its definition of the direct contempt power conferred by Article 48:

> The conduct described in Article 48, constitutes a direct contempt. Neither indirect or constructive contempt, that is, that which is not committed in the presence or immediate proximity of the court while it is in session . . . is punishable under Article 48.[78]

Although there has been no serious dispute over this language for some time, one pre-Code commentator had come to an opposite conclusion. DeHart acknowledged the power of the court-martial to forbid the publication of the proceedings of a court-martial before the termination of the trial. He then stated: "A violation of this order of the court would be a contempt and punished as any other species of contempt."[79] DeHart was one who cast doubt upon the power of courts-martial to punish civilians, and yet here he advocates punishing an indirect contempt by apparently civilian news media. This finding written in 1862 was rejected the next year by an opinion of The Judge Advocate General forcefully setting forth the necessity of direct contempt:

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[76] *Id.* at C.M.R. 20.

[77] Miller, *Who Made The Law Officer A Federal Judge?*, 4 MIL. L. REV. 39 (1959).

[78] MCM, 1969, para 118*a*.

[79] DEHART, *supra*, note 30, at 108–109.

> The power of a court-martial to punish under this article, being confined practically to acts done in its immediate presence, such a court can have no authority to punish as for a contempt, a neglect by an officer or soldier to attend as a witness in compliance with a summons.[80]

In 1865, another TJAG opinion reached the same conclusion with a somewhat different slant:

> The power of a military court to punish by summary court for contempts is confined to those committed in its immediate presence. Such court cannot arrest an officer for disobedience to its lawful commands, committed when absent from its session, as for a contempt. It should in such case appeal for redress to his superior officer or to the Secretary of War.[81]

This opinion does not set forth the fact situation, so we can but conjecture as to what the court-martial had directed the officer to do.

A number of the military judges in their comments to the survey indicated that they would welcome indirect contempt power to deal with disobedience to orders they have issued for the production of the accused and witnesses, for the proper uniforming of the accused and for securing mental and physical examinations. As one expressed it, the military judge definitely needs some out-of-court tool, not necessarily the contempt power, to assist him in accomplishing the court's business. This comment unconsciously reflected Lieutenant Colonel Davis' attitudes of 70 years earlier:

> Courts-Martial have no jurisdiction over cases of constructive contempt. In dealing with a military person he may be charged under some specific article submitted to a convening authority. . . . As far as civilians committing constructive contempt, the court-martial has absolutely no jurisdiction.[82]

Therefore we find evidence of offenses which would constitute contempt in Federal courts, charged as disorders or neglects to the prejudice of good order and military discipline.[83] But there appear to be no reported instances of such proceedings against civilians.

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[80] DIG. OPS. JAG 1912 Articles of War para. LXXXVI A, at 162 (Oct. 1863).

[81] DIG. OPS. JAG 1865 Seventy-Sixth Article, p. 11 (1865).

[82] DAVIS, *supra*, note 10, at 139.

[83] Examples have been refusal by an officer or soldier to testify when duly required to attend and give evidence as a witness before a court-martial. DIG. OPS. JAG 1912 Articles of War, para. LXII d at 149 (April 1880); a public criticism in a newspaper (by an officer) of a case which had been investigated by a court-martial and was awaiting the action of the president. *Id.* (March 1886); disclosing a finding or sentence of a court-martial in contra-

F. ". . . *OR WHO DISTURBS ITS PROCEEDINGS BY ANY RIOT OR DISORDER.*"

This phrase was briefly touched upon in the discussion on menacing words, signs, and gestures, but as Winthrop points out, there is more to the phrase than one might sense in a casual reading.

> The word "riot" is regarded . . . as meaning—to cite the definition of Webster—"wanton or unrestrained behaviour; uproar; tumult." The term "disorder" is still more general, and, in a broad sense . . . would mean, literally, any conduct in breach of the *order* of the proceedings. But, in the connection in which it here occurs, it is construed as implying more than a mere irregularity, and as importing disorder so rude and pronounced as to amount to a positive intrusion upon and interruption of the proceedings of the court. The more familiar examples . . . are—assaults committed upon members, (footnotes omitted) or upon persons connected with the court or properly before it; altercations between counsel or spectators; drunken, or indecent conduct; loud and continued conversation; any noise or confusion which prevents the court from hearing the testimony, . . . ; any shouting, cheering, or other expression of applause or disapprobation, especially if repeated after being checked; contumelious or otherwise disrespectful language, addressed to the court or a member or the judge advocate, or of so intemperate a character as to derange the proceedings, especially if persisted in after a warning from the court.
>
> . . . But acts not of a violent or disturbing character, though they might constitute contempts at common law and before the civil courts, would not be *disorders* in the sense of the present Article. Thus a quiet refusal by a witness to be sworn, or to answer a proper question on his examination, or a standing mute or simple refusal to testify at all, would not be punishable as a disorder and contempt before a court-martial.
>
> . . . .
>
> The words "in its presence" not being connected in the context with the clause of the Article under consideration, the same may be held to include disorders which, though disturbing the proceedings are not committed in the court-room itself. . . . [I]t has been held that disorderly conduct at or near the entrance of the court-room, or outside but in the sight or hearing of the court, and so loud or conspicuous as to interrupt and embarrass the proceedings, was a contempt; and a similar rule might properly be applied to like disturbances of military trials.[44]

These observations breathe some efficacy into what might otherwise be a very anemic measure for the court-martial to protect

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vention of the oath prescribed. *Id.* (Sep. 1886); and sending a contemptuous message to the court after having been excluded from the courtroom. Gen. Ct. Martial Orders No. 37, Adjutant Gen. Off. (Oct. 1873).

[44] WINTHROP, *supra*, note 10, at 308–310.

itself. But comparing Winthrop's comments on the subject of menacing words, signs, and gestures, with those above quoted shows that we still do not cover all of the conduct which may be contemptuous of a court. The descriptive term "menacing" has the effect of excluding from the cognizance of the court, the use, in its presence, of improper words, which yet do not express or involve a threat or defiance. Thus language, however disrespectful, if it be not of a minacious character, cannot be made the subject of a contempt proceeding. And insofar as a disorder must be so rude and pronounced as to amount to a positive intrusion upon and interruption of the proceedings, acts not of a violent or disturbing character, though they might constitute contempts before civil courts would not be disorders under Article 48.[83]

G. *"THE PUNISHMENT MAY NOT EXCEED CONFINEMENT FOR 30 DAYS OR A FINE OF $100, OR BOTH."*

The Manual provides:

> In order to be effective, a punishment for contempt requires approval of the convening authority. Upon notification of the action of the court and pending formal review of the record of the contempt proceedings, the convening authority may require the person to undergo any confinement adjudged.
> . . . The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall, upon approval of the punishment by the convening authority, be designated by that officer.[84]

Chapter XXV of the Manual provides the definition and discusses the application of that little used punishment, the fine.

> (3) *Fine.* Whereas a forfeiture deprives the accused of all or part of his pay only as it accrues, a fine, when ordered executed, is in the nature of a judgment and makes him immediately liable to the United States for the entire amount of money specified in the sentence. All courts-martial have the power to adjudge fines instead of forfeitures in cases involving members of the armed forces. General courts-martial have the further power to adjudge fines in addition to forfeiture in appropriate cases. . . . Special and summary courts-martial may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in a case. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as the result of the offense of which he is convicted. However a fine may always be imposed as a punishment for contempt. (Art. 48).
> . . . Ordinarily, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to mili-

[83] Ochstein, *supra*, note 66, at p. 27.
[84] MCM, 1969, para 118*b*, *c*.

> tary law. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired.
> . . . The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court.[87]

In paragraph 126*h*(3) of the Manual, the period of confinement in lieu of payment of the fine ". . . shall not exceed the jurisdictional limitations of the court." [88] But that paragraph does not say that the amount of the fine shall not exceed the jurisdictional limitations of the court. It would therefore appear to follow that any class of court-martial can impose a fine not to exceed $100 regardless of the fact that this amount may otherwise exceed its jurisdictional limitation. This follows logically from the fact that the contempt article, unlike the punitive articles, does not require reference to the Table of Maximum Punishments because the punishment is set forth in Article 48 itself.[89]

There does not appear to be any particular problem that would occur when confining with military persons. If confinement is adjudged and approved, the normal facilities would be utilized. It is once again with civilians that the special problems would exist. Paragraph 126*j* of the Manual admonishes that the place of confinement will not be designated by the court, and refers the reader to paragraph 93.

> The authority who orders a sentence to confinement into execution shall designate the place of confinement in accordance with pertinent departmental regulations. . . . [A sentence] may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. . . .[90]

While on a trip to Fort Bragg, North Carolina, I inquired of

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[87] MCM, 1969, para 126*h*(3). But see also Tate *v.* Short, 8 CRIM. L. REP. 3151 (1971), wherein the United States Supreme Court held that imprisonment of those who could not afford to pay a fine was a denial of equal protection under the Constitution and hence invalid.
[88] MCM, 1969, para 126*h*(3).
[89] UCMJ, art. 48.
[90] MCM, 1969, para 93.

the Fort's confinement officer whether his stockade would be a suitable place of confinement for a civilian contemnor. I received the very emphatic reply that it would not be. No survey of other stockades was attempted, but it is believed that the answers would be the same from other confinement officers.[91]

Insofar as paragraph 93 of the Manual does contemplate as a place of confinement one not under the control of any of the armed forces,[92] the convening authority may make arrangements to utilize either a United States penal or correctional institution or, if one is not readily available, a state facility. It is recommended that such arrangements be made before the actual need arises so that the military judges detailed to try cases within the particular area would know whether the punishment of confinement of a civilian contemnor is possible.

IV. THE CONTEMPT PROCEDURE

A. *THE MILITARY JUDGE SITTING ALONE*

In this situation the contempt proceeding most resembles that found in civilian courts where the judge rules upon the finding of contempt and assesses an appropriate sentence.[93]

As stated in paragraph 118*b* of the Manual:

> When the conduct of a person before a court-martial warrants action under Article 48, the regular proceedings of the court should be suspended and the person directed to show cause why he should not be held in contempt. He will be given an opportunity to explain his conduct. . . .
>
> When the military judge is trying the case alone, he will determine whether a person shall be held in contempt, and if he so determines, he will proceed to determine an appropriate punishment. . . .

B. *PROCEEDINGS BEFORE COURT-MARTIAL MEMBERS*

Here the contempt proceeding markedly differs from that found in the civilian system. The complex procedure is outlined in

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[91] The Report of the Special Civilian Committee for the Study of the United States Army's Confinement System (15 May 1970) does not treat the problem of civilian prisoners. This is not surprising insofar as the number would be miniscule. It would probably be inappropriate for the Army stockades to make special contingent arrangements for such prisoners.

[92] MCM, 1969, para. 93.

[93] Guidance is found in paragraph 118 of the Manual and also at appendix 8c. Appendix E of the Military Judges' Guide can also be adapted to the judge sitting alone, but is primarily designed for use when a court-martial is composed of military judge and members. UNITED STATES DEP'T OF THE ARMY, PAMPHLET NO. 27-9, MILITARY JUDGES' GUIDE, E-1.

paragraph 118*b* of the Manual. A step-by-step analysis puts this detailed procedure into a somewhat simpler form. For simplicity "military judge" will refer to the military judge or the president of a special court-martial sitting without a military judge.

1. Military judge determines that a person's conduct warrants action under Article 48.
2. He so informs the person and advises him that he may show cause why he should not be held in contempt.
3. After the person has had an opportunity to explain his conduct, the military judge makes a preliminary ruling as to whether the person should be held in contempt. He then instructs the court as to the standards by which the determination was made and asks the court whether any member has an objection to his ruling.
   a. If he ruled that the person not be held in contempt and there is no objection to his ruling, the case continues.
   b. If he ruled that the person not be held in contempt and there is an objection to his ruling, see step 4.
   c. If he ruled that the person be held in contempt and there is no objection to his ruling, skip step 4 and go to step 5.
   d. If he ruled that the person be held in contempt and there is an objection to his ruling, see step 4.
4. In instances 3b or 3d, the court will close, the members will vote orally beginning with the junior in rank, and the question will be determined by a majority vote. A tie vote will favor the person proceeded against. The court re-opens to announce its decision.
   a. If the objection to case 3b is upheld, continue to step 5.
   b. If the objection to case 3b is defeated, the matter is at an end and the case continues.
   c. If the objection to case 3d is upheld, the matter is at an end and the case continues.
   d. If the objection to case 3d is defeated, continue to step 5.
5. In instances 3c, 4a, and 4d a preliminary determination has been made that the person should be held in contempt. The court is then instructed by the military judge as deemed "appropriate." Such instructions would probably include reiteration of the standards necessary to find one in contempt and instructions as to the maximum sentence authorized in the event a final determination is that the person is in contempt of the court.

6. The court will then close to determine the question by secret written ballot, two-thirds of the members present at the time the vote is taken are necessary to make the finding of contempt.
   a. If the court determines that the person be held in contempt, they will without reopening, vote in the same method on the sentence.
   b. If they determine that the person not be held in contempt, continue to step 7.
7. The court re-opens to announce its findings and sentence if there has been a determination made under 6a. The record of the entire contempt proceeding is then typed up immediately.

C. *APPROVAL BY THE CONVENING AUTHORITY*

Where a sentence has been adjudged, either by members of the court, or by the military judge, it must be approved by the convening authority before it can be ordered into execution. Paragraph 118*b* of the Manual continues:

> . . . Upon notification of the action of the court and pending formal review of the record of the contempt proceedings, the convening authority may require the person to undergo any confinement adjudged. . . . The person held in contempt shall be advised, in writing, of the holding and punishment of the court and also of the action of the convening authority upon the proceedings for contempt. Copies of this communication shall be furnished to such other persons as may be concerned with the execution of the punishment, and a copy shall also be included with the record of trial proper.
>
> . . . .
>
> A person held in contempt may be allowed to continue to testify or to perform his functions before the court.

V. THE CONSTITUTIONALITY OF SUMMARY PROCEEDINGS FOR CONTEMPT

A classic statement in favor of the summary contempt power by the United States Supreme Court appeared in *Ex Parte Terry*.[84] The first Mr. Justice Harlan, writing for the unanimous court, said that the summary power of contempt was:

> . . . vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depended the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the Government or by the lawlessness or violence of individuals. . . .

[84] *Ex Parte* Terry, 128 U.S. 289 (1888).

> That power [to punish contempt summarily] cannot be denied them [courts] without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. . . ."

More recent debate in the area has concerned the constitutionality of civilian summary contempt proceedings. The federal rule is stated in 18 U.S.C. § 401:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The procedures under this statute are embodied in Rule 42(a) of the Federal Rules of Criminal Procedure.

> Criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

The questions of when the summary proceeding outlined in Rule 42(a) may be properly used and under what circumstances resort to jury trial of a contemnor will be required were discussed by the Supreme Court in *Sacher* v. *United States.*

> We think "summary" as used in [the Rule (42)] does not refer to the timing of the action with reference to the offenses but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence."
>
> We hold that Rule 42 allows the trial judge upon occurrence in his presence of a contempt, immediately and summarily to punish it, if in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power."

The proposition that the summary procedure was constitutional

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" *Id.* at 307, 309.
" FED. R. CRIM. P. 42(a).
" Sacher *v.* United States, 343 U.S. 1, 9 (1952).
" *Id.* at 11.

in all cases where the contempt occurred in the judge's presence has since been modified. In *Bloom* v. *Illinois*,[99] the Supreme Court held that a contempt punishable as a serious crime may not be tried summarily. Rather, the contemnor would be entitled to a jury trial, even though the contempt was committed in the presence of the court. But as long as the punishment was for a petty offense the judge could proceed to punish summarily for those contempts committed in his presence.

> It is old law that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses . . . petty crimes need not be tried to a jury.[100]
> [W]e have said that we need not settle "the exact location of the line between petty offenses and serious crimes" but that "a crime punishable by two years in prison is . . . a serious crime and not a petty offense." . . . Bloom was sentenced to imprisonment for two years.[101]

The line between the petty offense and the serious crime then has still not been drawn, but it would appear that the 30 day maximum sentence allowed by the Uniform Code of Military Justice for violation of Article 48 would certainly indicate a petty offense. In another line of decisions the court established the precedent that when the judge is personally attacked by the contemnor [102] or where he permits himself to become personally embroiled with the contemnor [103] he would not be flinching from his duty to ask one of his fellow judges to take his place in acting upon any contempt proceedings. This rule was made even more compelling in the recent case of *Mayberry* v. *Pennsylvania*.[104] There the court stated "that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." [105] But other language in the case puts an aura of uncertainty on this holding.

> Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal strings to ask a fellow judge to take his place.[106]

This dicta would indicate that if the judge acts immediately to

[99] 391 U.S. 194 (1968).
[100] *Id.* at 210.
[101] *Id.* at 211.
[102] Cooke *v.* United States, 267 U.S. 517 (1925).
[103] Offutt *v.* United States, 348 U.S. 11 (1954).
[104] CRIM L. REP. 3065 (Jan. 20, 1971).
[105] *Id.* at 3068.
[106] *Id.*

punish the contemptuous behavior, he can do so whether the attack was personal or not. The holding seems to require that a judge, if personally attacked should never decide the contempt issue. But perhaps the most puzzling aspect of the holding is the complete failure to mention the requirement for jury trial as set forth in *Bloom*. The issue of petty offense as opposed to serious crime was certainly present. Mayberry's sentence for the 11 contempts of which he had been found guilty was one to two years each—a total of 11 to 22 years.[107] And yet, Mr. Justice Douglas in writing for the court said:

> In the present case [due process] can be satisfied only if the judgment of contempt is vacated so that on remand *another judge*, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, *sits in judgment on the conduct of the petitioner as shown by the record.*[108]

Perhaps confusion may be avoided by the adoption of the proposed Federal Criminal Code:

> The study draft, Sections 1341—1349, innovates in this area by making ordinary defined crimes out of most types of contempt, by restricting the term of imprisonment (no more than thirty days) the judge may summarily impose for contempt, and by creating a procedure under which the judge, in lieu of utilizing summary contempt procedure or following a summary contempt conviction "necessary to prevent repetition of misbehavior disruptive of an ongoing proceeding," may certify the case for prosecution as an ordinary specific offense. This arrangement preserves the inherent self-defensive power of the courts while requiring that normal criminal procedure be followed in imposing substantial sentences for misbehavior amounting to ordinary crime.[109]

Punishment limited to thirty days would, of course, be in line with that permitted by Article 48 of the Uniform Code of Military Justice. But neither the Supreme Court opinions nor the Proposed Federal Criminal Code address themselves to the amount of fine that might be permissible in summary proceedings. Article 48 limits it to $100. One commentator on the proposed new contempt statute for Texas states that a fine of $100 is light punishment, considering the great publicity which might be gained for an activist by using flagrant acts and obscene language in contempt of court.[110] But in sum, a comparison of the

[107] *Id.* at 3065.

[108] *Id.* at 3068 (emphasis added).

[109] Brown & Schwartz, *Offenses Redefined Under Proposed Federal Criminal Code*, 56 A.B.A.J. 1181, 1182 (1970).

[110] Greenhill, *Proposed New Statute on Contempt*, 33 TEX. B.J. 970 (Dec. 1970).

military practice with the federal requirements shows clearly that the military practice is constitutional.

VI. ALTERNATIVES TO THE USE OF ARTICLE 48

In chapter III it was pointed out that in some contemptuous situations it may be better for the military judge not to resort to Article 48. One alternative is to prefer a charge for violation of a punitive Article of the UCMJ.[111] Another situation may call for admonition of the contemnor or perhaps his expulsion from the court room if he persists in disorderly behavior despite the admonition.[112]

Insofar as no punitive sanctions are involved in admonition or expulsion, there would be no reason to follow the requirements of either Article 48 or paragraph 118.[113] It would seem rather that this power would emanate from the inherent power of the military judge to maintain the orderliness of the trial. This power is not without precedent.

> A court-martial is authorized to exclude from its session any person who, it has good reason to believe, will endeavor to intimidate or interrupt the witness, or otherwise conduct himself in a disorderly manner.[114]

There would appear to be no impediment to the removal of a contemptuous spectator under this provision. But what if that spectator was a member of the press? The argument was made in *Wessman v. United States*[115] that a court-martial was a public affair and hence the press were entitled to be in attendance. The court doubted whether the defendants had standing, and said that civilian members of the press in attendance at a court-martial may be ordered to conform to standards of conduct and may be excluded if necessary to maintain orderly proceedings.[116]

Removal of witnesses would pose few problems insofar as they are generally excluded other than when testifying.[117]

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[111] *See* last paragraph of text in § III.A.

[112] *See* text discussion of § III.B.

[113] Of course paragraph 118 does in fact sanction these alternatives. "The court, instead of proceeding as stated above, may cause the removal of the offender and, in a proper case, initiate his prosecution before a civil or military court." MCM, 1969, para 118*b*.

[114] DIG. OPS. JAG 1912 Articles of War para LXXXVI A1 at 162 (Aug. 1869).

[115] 387 F. 2d 271 (10th Cir. 1967).

[116] MCM 1969, para 53*e*. To buttress its ruling the court cited Sheppard *v.* Maxwell, 384 U.S. 333, 357–58 (1966), and Estes *v.* Texas, 381 U.S. 532, 539–40 (1965).

[117] MCM, 1969, para 53*f*.

The law is now fairly well settled as to what to do with the contemptuous defendant. The United States Supreme Court in *Illinois* v. *Allen* said:

> [W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.[118]

In an in-depth study of the *Allen* case, Joel M. Flaum and James R. Thompson [119] set forth standards by which to judge the efficacy of the warning given by the trial judge prior to exercising the right of exclusion.

> Following disruptive behavior which, if continued would justify expulsion or behavior which, while perhaps not alone justifying expulsion, is combined with the expressed intention of the defendant to engage in future conduct that is more severe, the trial court must
>
> (1) Warn the defendant that his conduct, or expressed intentions, are wrong and violate the dignity and respect for judicial proceedings which must be enforced;
>
> (2) Will not be tolerated during the course of the trial, and that future occurrences of a like nature will result in expulsion from the trial for as long as his disruptive posture is maintained, that
>
> (3) the trial will continue in his absence, that
>
> (4) he will lose his right to see and hear the witnesses testify and the evidence introduced, and will lose his right to observe all other proceedings of the trial, and that
>
> (5) he will not be re-admitted to the courtroom until he indicates expressly, and for the record, that he will cease disruption.[120]

The study goes on to point out that the *Allen* case allows the defendant who has been expelled to reclaim his right to be present.[121] The study also sets forth some methods to keep the defendant apprised of the progress of his trial.[122] In particular, the defendant's attorney should be allowed to see the expelled defendant as often as possible. Further technological aids such as a daily copy of the transcript or closed wire radio or television may be utilized if possible. The authors caution that in connection with a decision as to whether such expense is justified,

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[118] Illinois v. Allen, 397 U.S. 337, 343 (1970).
[119] Flaum & Thompson, *The Case of the Disruptive Defendant: Illinois* v. *Allen*, 61 J. CRIM. L.C. & P.S. 327 (1970).
[120] *Id.* at 334.
[121] *Id.* at 334–336.
[122] *Id.* at 336–337.

> the facility is being sought not by a defendant who is trying to enforce a right, but by one who has forfeited a right by his contemptuous disregard for the order and decorum inherent in the judicial process.[123]

The *Allen* decision sanctioned at least four possible techniques that could be used by trial judges to end disruption by the defendant: (1) criminal contempt; (2) recess of the trial with the defendant remanded to custody; (3) binding and gagging; and (4) expulsion.[124]

This decision comports well with paragraphs 60 and 11*c* of the Manual for Courts-Martial. Paragraph 60 provides:

> Attendance and Security of Accused. The convening authority, the ship or station commander, or other proper officer in whose custody or command the accused is at the time of trial is responsible for the attendance of the accused before the court and will determine the nature and degree of any restraint to be imposed on the accused. However, physical restraint will not be imposed upon the accused during open sessions of the court unless prescribed by the military judge or the president of a special court-martial without a military judge. . . . The presence of the accused throughout the proceedings in open court is, unless otherwise stated, essential. See 11*c* (Effect of voluntary absence from trial).[125]

Paragraph 11*c* provides:

> *Effect of voluntary absence from trial.* The accused's voluntary and unauthorized absence after the trial has commenced in his presence and he has been arraigned does not terminate the jurisdiction of the court, which may proceed with the trial to findings and sentence notwithstanding his absence. In such a case the accused, by his wrongful act, forfeits his right of confrontation.[126]

The remaining class of courtroom participants who could be expelled for contempt would be the counsel. Their role is so instrumental, however, that expulsion would necessitate a recess of trial until counsel could be replaced or purged of their contempt by an express indication that they would conduct themselves in accordance with paragraph 42*b* of the Manual.[127]

The 1952 Law Officer Handbook in speaking of removal of counsel during trial offered advice which remains valid two decades later:

> Ordinarily the trial and defense counsel should be allowed to continue to perform their duties before the court even though held in-

[123] *Id.* at 337.
[124] Illinois *v.* Allen, 397 U.S. 337, 343–346 (1970).
[125] MCM, 1969, para 60.
[126] MCM, 1969, para 11*c*.
[127] MCM, 1969, para 42*b*.

> contempt, unless it appears that they cannot be expected to conduct themselves properly during subsequent proceedings. In fact it is a better practice to defer until the conclusion of the case contempt action against counsel. The timely suggestion of the prospect of contempt action often serves as sufficient warning to counsel that he must improve his conduct or suffer the consequences.[128]

VII. RECOMMENDATIONS

Because they are too restrictive in scope and too cumbersome in effect, the author is of the opinion that neither Article 48 nor its implementing procedural rules are satisfactory for the purpose for which they were ostensibly provided—to maintain order and prevent disruption by the summary punishment of the offender.

Article 48 should be amended to provide:

> (a) A court-martial without a military judge, a provost court or a military commission may summarily punish any person who commits a contempt in its presence. The punishment may not exceed confinement for 3 days or a fine of $25, or both.
>
> (b) A military judge of a court-martial may summarily punish any person who commits a contempt in the presence of the court-martial. The punishment may not exceed confinement for 30 days or a fine of $250, or both.

This amendment would eliminate the descriptive language used in the present Article 48 which restricts the behavior properly punishable as a contempt. It adopts the non-restrictive style of Rule 42(a) of the Federal Rules of Criminal Procedure. The proposed amendment will preserve the favorable precedents established in military law as to scope of coverage, while at the same time utilizing the federal standards as enunciated in the federal court decisions as a guide to the conduct which constitutes contempt.

The amendment is intended to maintain the "petty offense" character of the punishment in order to constitutionally preserve the summary nature of the proceeding. Despite different maximum punishments, the amendment preserves the power to punish on the same grounds as the military judge to the summary court-martial and the special court-martial without a military judge as well as to the provost court and military commission.

An amendment to Article 48 has been proposed by Senator Birch Bayh as a part of his proposal to extensively overhaul the Uniform Code of Military Justice.[129]

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[128] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-9, MILITARY JUSTICE HANDBOOK—THE LAW OFFICER, 25 (1952).

[129] S.4191, 91st Cong., 2d Sess. (1970).

§ 848. Art. 48 Contempts.

(a) A summary court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.

(b) A military judge of a courts-martial shall have power to punish by fine or imprisonment, at his discretion, such contempt of its authority, and none other, as—

(1) misbehavior of any person in his presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of the officers of the court-martial in their official transactions; and

(3) disobedience or resistance to the lawful writ, process, order, rule, decree, or command of the military judge.

(c) Punishment under this section may not exceed confinement for 30 days, or a fine of $100, or both.[130]

Although this amendment provides relief for some of the difficulties pointed out in this study, it would not be as efficacious as the amendment which I have proposed. The dichotomy in the definition of contempt for the summary court-martial, provost court, and military commission on the one hand, and that given for the military judge on the other, is not wise. If it is felt necessary to limit those "inferior" bodies I would suggest doing it by the quantum of punishment which they might mete out, not in the definition of the contempt.

Clauses (b)(1), (2), and (3) of the Bayh proposal are, of course, taken directly from the federal contempt statute, 18 U.S.C. § 401.[131] Although clauses (b)(1) and (2) define what is in fact contemptuous behavior, (b)(2) seems unnecessary insofar as the military is concerned because "officers of the court" refer to sheriffs, bailiffs and like officers who have no counterparts in a court-martial. Any misbehavior by court personnel could either be handled under the general contempt power, or by preference of charges under the UCMJ. The restriction imposed by (b)(1) that the misbehavior obstruct the administration of justice would not on its face permit punishments for contempt

[130] *Id.* at § 848. The Bayh Bill does not provide for a special court-martial without a military judge. Hence, there is no oversight in failing to provide contempt power for the president of a special court-martial without a military judge. There does appear to be an oversight which has created an ambiguity in the punishment which may be meted out by a military judge, however, Clause (b) states that he " . . . shall have power to punish by fine *or* imprisonment . . .," whereas clause (c) provides a maximum punishment of ". . . confinement for thirty days or a fine of $100, *or both*." *Id.* § 848.

[131] *See* § V., *supra*.

insulting the dignity of the court or other acts of a passive nature now recognized as contempts. It is therefore submitted that the offense of contempt is adequately defined by judicial pronouncements and that to define proscribed behavior as "a contempt" would not be unconstitutionally vague.

Clause (b)(3) would be popular with the military judges. Nearly all of the military judges surveyed expressed the desire to have some type of indirect contempt power that would accomplish the goals set forth in this clause.[132]

Paragraph 118 of the Manual for Courts-Martial should be amended to reflect the proposed change in Article 48 and to remove the impediments to its being truly a summary action. This would be accomplished by two measures. The first would allow the military judge sitting in a court-martial with members to determine contempt and punishment in the same manner as presently provided for the military judge trying the case alone. This would make final the finding of contempt by the military judge and further authorize him to determine the punishment. The most obvious advantage of this procedure is its ease, but a secondary advantage would be that it would put the procedure on a par with the federal practice and permit the adoption of the federal procedural rules as promulgated by federal court decisions.[133]

The second measure suggested to insure the summary nature of the proceeding would be to eliminate the requirement of approval of the punishment by the convening authority. The requirement of approval prevents resumption of the proceedings of the court-martial until a transcript of the contempt proceeding has been made. If the military judge desired to impose immediate punishment, the trial would have to be adjourned awaiting the action of the convening authority.[134] To eliminate the requirement for approval of the punishment for contempt would not, in my

[132] The scope of this study would not allow a full investigation of this possibility. Therefore, I pass comment upon the clause other than to say that it merits further investigation. There would certainly be the problem of deciding whether the military judge would have any power to issue a command to the convening authority, the violation of which would subject the convening authority to punishment by the court.

[133] It is probably preferable to reserve the finality of this decision to the military judge alone and not extend it to the president of a special court-martial without a military judge as that would make the proceeding very much akin to a summary court-martial. This deprivation should not create any undue hardship or inconvenience insofar as the instances of trial by that type of court are very rare in view of the requirements of Army regulations. *See* Army Reg. No. 27-10, para 2-15 (Change No. 3, 27 May 1969).

[134] MCM, 1969, para 118b.

opinion, violate the provisions of Article 64 of the Code.[135] The enforcement of that power is not an exercise of military jurisdiction over the contemnor. He is not subjected to trial and punishment for a military offense, but rather to the legal penalties for a defiance of the authority of the United States offered to its legally constituted representative.[136] Therefore the punishment is not a sentence as a result of findings of guilty to a charge referred to the court by the convening authority. Rather it is the result of a summary proceeding arising out of the court-martial, but not out of the charge. Furthermore the punishment may well be imposed against one other than the accused.

In conclusion, it is hoped that this study will in some way contribute to the maintenance of the high standards expected of courts-martial. Increasingly, a fair and orderly trial has been recognized as essential to those standards.

> . . . Every member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come. Take away that right and freedom of speech together with all other freedoms would wither and die, for in the long run it is the courts of justice which are the last bastion of individual liberty.[137]

[135] UCMJ, art. 64.

[136] *See* discussion at note 52 *supra*.

[137] Morris *v.* Master of the Crown Office, (1970) 2 MLR. 792, 800–801 (C.A.) as cited in *Report and Recommendations of the Am. College of Trial Lawyers, supra*, note 1, at 29.

PERSPECTIVE

A part of the function of any law review should be to present the thoughts of leading scholars and public officials. This section provides such a forum unhampered by traditional law review considerations of space, form, and citation. Naturally, the opinions expressed are those of their authors. The Review is honored to inaugurate this series with the work of the distinguished British international law scholar and practitioner, Colonel G. I. A. D. Draper.

THE ETHICAL AND JURIDICAL STATUS OF CONSTRAINTS IN WAR*

Colonel G. I. A. D. Draper**

This paper will attempt, within a necessarily short compass, to describe the contemporary relationship between a body of rules of considerable antiquity, the Law of War, and a relatively modern regime of fast growing importance, namely, that of Human Rights, an emanation of contemporary international morality. It will be the general theme of this paper that the two bodies of law have met, are fusing together at some speed, and that in a number of practical instances the regime of Human Rights is setting the general direction, as well as providing the main impetus, of the revision of the Law of War. Some general remarks will be attempted as to the future of this relationship and, if it be thought a desirable one, how it should be furthered.

The Law of War in its historical development ingested humanitarian restraints and prohibitions relatively late in its long history. At some time in history, probably in the 18th century the Law of War began to pay some attention to humanitarian considerations. The matter needs careful investigation, but I

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*A modified form of this paper was presented by Colonel Draper at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, on 10 September 1971.

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suspect that the writings of Rousseau, the much maligned, form some clue to the process. In the *Contrat Social*, published in 1762 and subsequently condemned and publicly burnt in Geneva, Rousseau gave expression to certain ideas which have had considerable ethical, juridical, and political consequences. One such statement was—"War is not a relation between man and man, but a relation between state and state in which individuals are enemies only incidentally, not as men, or citizens, but as soldiers."

By the mid-19th century the humanitarian movement gathered way under the impact of a number of diverse, social, moral, political, scientific, military and economic factors. In the main, I would not say that religious considerations, so decisive in the early formation of the old Law of Arms, the precursor of our Law of War, were controlling in the infusion of humanitarian considerations into the 19th century Law of War. It will be recalled that the Red Cross emblem has no Christian connotation, but is merely the heraldic arms of the Swiss Confederation, a white cross on a red background, reversed, as tribute to the origin of the Red Cross movement in that country inspired by that strange man, Henry Durant.

The ideas lying behind the first Geneva Convention of 1864 the direct outcome of the appalling suffering on the battlefield of Solferino in 1859, and dealing exclusively with the treatment of the sick and wounded and the medical services and installations, and the powerful de Martens preamble to the Hague Convention No. IV of 1907 on the Law of War on Land, both gave us the climate of humanitarian sentiment of the second half of the 19th century. De Martens, a Lutheran by religion, and a German-Balt by parentage, was converted to the Russian Orthodox faith. He became Professor of International Law at the Imperial University of St. Petersburg and held a senior position in the Imperial Foreign Ministry as well as his Chair at the University. He published his main work, in two volumes entitled "*International Law of Civilized Nations*" in 1882. He was one of the moving forces at the First Hague Peace Conference of 1899, convened by his master, Czar Nicholas II. In particular he was the draftsman of the famous Preamble to the Hague Convention No. IV, of 1907, which, in part, reads thus—

> "Being animated by the desire to serve, even in this extreme case (the resort to armed conflict), the interest of humanity and the ever progressive needs of civilization; . . .
> Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and

> the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience."

This basic formula is today repeated and inserted in each of the four Geneva Conventions of 1949 for the Protection of War Victims, Arts. 63,62,142 and 158, respectively.

The ideas reflected in this formula are still a long way from our modern ideas of Human Rights, but the parentage is surely there. Yet, as one can see in the debates surrounding the establishment of the criteria for lawful belligerency in Articles 1 and 2 of the Hague Regulations appended to the Hague Convention No. IV of 1907, the powerful thrust of military considerations is apparent. The position of the individual in the Law of War was still that of an object of the Law and not that of a legal *persona* endowed with rights under the Law of Nations. True it was that the individual, whether a regular soldier, a volunteer or marauder, was subjected to sharp legal duties deriving from the Law of Nations. The consequence of the breach of such duties was drastic. Perhaps the basis of their limited legal *persona* was to enable their trial, conviction and execution for violations of the Law of War. However, before we mount too stringent a criticism of our forbears on this account we would do well to remember that in our own time it has not yet been agreed among jurists that the individual enjoys legal rights under the modern Law of Armed Conflicts. States may be enjoined by that Law to ensure certain humanitarian standards of treatment to war victims such as POWs, civilians in occupied territory, the sick and wounded in the armed forces, but that is not the same thing as conferring rights of such treatment directly upon individuals, flowing from the Law of Nations. Indeed, it is much to be hoped that in this direction will lie one of the main influences of our contemporary Law of Human Rights upon the Law of Armed Conflicts, as we style it today.

In the post-1945 era we have witnessed a quite phenomonal development in the emergence of an international regime of Human Rights. Time and the place do not permit me to trace the source streams that have contributed to the broad river of the Human Rights regime. I have tried to do so in another place and given the credit to the early Stoics such as Cleanthes and Chrysippus of the third century B.C. The great Stoic tenets, often repeated in the writings of the Emperor Marcus Aurelius, that: (i) man is both reasonable and social; (ii) the Universe

is governed by an immutable law; (iii) that law is the expression of perfect reason; and (iv) that law is the pattern of all good—have all contributed to the perennial conception of Natural Law. This in its turn has played a decisive role in the development of International Law. Finally, the contemporary regime of Human Rights is thought to stem directly from the "Naturalist" School of thinking in International Law. Such I conceive to be the paternity of our contemporary conception of Human Rights.

More immediately and pragmatically, the movement for the abolition of the slave trade in the 19th century, treaties for the treatment of Minorities in the post World War I era, standards evolved by the International Labour Organization, the standards evolved for the proper treatment of aliens by State practice, humanitarian interventions by armed forces of States at the turn of the 19th century, treaties for the abolition of slave labour, for imposing standards of health and hygiene, the early attempt to control narcotics traffic under the aegis of the League of Nations, the system of Mandates, the punishment of war crimes and crimes against humanity, have all in their different ways made their contribution to the establishment of the post-1945 Human Rights regime. At the same time modest progress was made in establishing mechanisms of enforcement of that law, whether customary or conventional, within the international sphere. All this experience was vital to what has been achieved in our time, and, I venture to say, to help us on the long journey we have yet to go to enable man to walk with dignity and without fear on the face of this earth.

In the main I think it can be said that in the League of Nations era the direct nexus between the ideas of Human Rights and the existing Law of War was not envisaged. No doubt, the great improvement made by the International Committee of the Red Cross and the League of Nations in the establishment of the two Geneva Conventions of 1929, dealing with the better treatment of the Sick and Wounded in the Armed Forces and of POWs, respectively, and the Geneva Gas Protocol of 1925, a very relevant instrument of law today, furthered the humanitarian endeavor. As yet, however, the idea that individuals should receive specified human rights, simply as human beings and determined by that nature of that central entity, at the hands of International Law, was substantially something for the future. The critical period in this development comes in with the nightmare experiences of World War II and the establishment of the Charter of the United Nations in 1945. It is that appalling ex-

perience and that basic instrument of International Law which, to my mind, brings effectively into juxtaposition Human Rights and the Law of War. Both the Preamble and Article I of the U.N. Charter make crystal clear that the framers were under the impression that the unleashing of aggressive war occurred at the hands of those States in which the denial of the value and dignity of the individual human being, of whatever race, colour or creed, was most evident. The nexus that the framers of the U.N. Charter saw between the gross criminality of State aggression by armed force and the no less gross denial of human worth within the frontiers of such States, repeated and increased in the areas that military adventures subjected to their occupation, rammed home in a way that mankind was not likely to forget the connection between aggressive war, the way it is waged, and the total disregard of the individual. As we know, the culmination of that lesson was seen in the genocide activities of the Third Reich and the many labour or "work education camps" where genocide was achieved more slowly and with almost worse suffering. In that experience the juxtaposition between the process of war and the position of the human being stood for all mankind to see and reflect upon. The culmination of the War in the Far East by the new weapon of mass and indiscriminate destruction of human life and all that it had achieved, was a fitting culmination to the period of barbarity the world had experienced for 6 years.

It was therefore not surprising that the conception of "Crimes against Humanity" found a place in the Charter annexed to the London Agreement of August, 1945, establishing the International Military Tribunal at Nuremberg and delineating the substantive law to be applied by it. The ideas of crimes against humanity, though playing a marginal role in the final estimate of the guilt of the accused, affirmed the existence of certain fundamental human rights superior to the law of the State and protected by international criminal sanction even if violated in pursuance of the law of the State. Such ideas are of considerable importance in the story of the emergence of the concept of Human Rights protected by international law. States might still remain the primary right holders under that system of law but individuals, acting as the organs of State power, might, within International Law, be criminally answerable for grave denials of those essential rights inhering in all human beings just by virtue of that quality of existence. Prominent among such essential rights was the right to life and the prohibition of its

arbitrary extinction. The Genocide Convention, 1948, filled out this idea in specific legal prohibitions attached to specific definitions of what constitutes genocide, rightly considered as the supreme denial of human rights. The Convention also marked in a way not shared with the Geneva War Victims Conventions the important departure point that the regime of human rights would apply in time of peace as well as in war, for one is no less a human being in the one than in the other. At that time, 1948, it was thought a strange thing that an international crime was so defined that it extended to commission in peace and war, so ingrained was the idea of a dichotomy between the International Law of Peace and of War, the traditional and classical legal distinction. It is a measure of the progress that we have made in this area of our thinking since 1948 that I have attended a Conference of 40 odd States in Geneva this year in which there was a strong move to obtain acceptance of the idea that the Law of Human Rights should operate full boom in time of war as in time of peace. Things are indeed changing and at great speed.

The Charter of the U.N. puts the scourge of war and the faith in fundamental human rights for all, in the forefront of its Preamble and thereby colours and informs the content of all that follows in the Charter. Gross disregard of Human Rights was for all time allied in the minds of men and women everywhere with the scourge of War. Article 2 (4) of the Charter has established a prohibition of the threat or use of force by one State against another, a considerable extension of any idea implicit in the old idea of the "just war". Further, the equal application of the Law governing the conduct of armed conflicts to those illegally resorting to armed forces and those lawfully resorting thereto is accepted as axiomatic in modern International Law. It may not be without importance to point out that this is the first time in the long history of the Law about armed force that we have reached a point where there is a major legal limitation upon resort to armed force and an extensive body of law governing the manner of using armed force applicable irrespective of the legality or otherwise of the initial resort to armed forces, existing at one and the same time within the system of International Law. This is achievement indeed, marred only by the consideration that at that precise moment in time, 1945, the world experienced the first use of the nuclear weapon. The existence of that weapon neither negatives the validity of the *jus ad bellum* or the *jus in bello* or the distinction between them. On the contrary, the generally accepted view among jurists is that the

use of nuclear weapons is governed by the general principles of the customary law of war. Indeed the operation of the legal device of reprisals, an accepted method of enforcement of the law of war, certainly comes into play in the event of an armed conflict between nuclear belligerents. Deterrence does not stand outside the realm of the Law of War but is an example of its application.

The approach between the Law of Armed Conflicts and the Regimes of Human Rights, both regional and universal, can now be seen in a series of Resolutions of the General Assembly of the U.N. There is today the closest cooperation between that Organization and the International Committee of the Red Cross which has come to be the institution primarily concerned with the development and revision of the Law of Armed Conflicts, at least so far as the protection of war victims is concerned. One has but to study the recent Report of the Secretary-General of the U.N., A/8052 of 18 September, 1970, entitled "Respect for Human Rights in Armed Conflicts" to see how close has been the approach between the Law of Armed Conflicts and the Regimes of Human Rights. This year, at Geneva, a Conference of Government Experts of some 40 States was held for three weeks on the subject of "The Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts." A further such Conference among a considerably widened grouping of States will probably be held in May, 1972. The Secretary-General's representative plays an active part in the Conference of Government Experts convened by the International Committee of the Red Cross and a report on the work of that Conference will be presented by the Secretary-General to the General Assembly of this year, pursuant to a mandate from the General Assembly of last year, 1970. This is the current method of progress whereby the juxtaposition between the Regime of Human Rights and the Law of Armed Conflicts is elaborated and crystallized. It is this process to which I now invite your attention in more detail.

For quite a time after 1945 the Law of War and the Law of Human Rights pursued their own paths. Obviously, there were overlaps, but in the main they kept to their separate tasks. Both the Genocide Convention, 1948, and the four invaluable Geneva Conventions of 1949 for the protection of war victims were primarily backwards-regarding. The experience of World War II was heavy upon the framers of these instruments. The main advance in the ICRC endeavour was the instigation and preparation of the Geneva (Civilians) Convention. For the first time, the

civilian, as such, was to be the beneficiary of legally established inter-State standards of behaviour designed to secure the minimum interference with his life and well-being by reason of the accident of his country being occupied by a military adversary or by reason of his being found in the territory of the opposite belligerent. Nothing, be it noted, was, or possibly at that time could be, achieved for the civilian caught in the maelstrom of the combat areas. That luckless individual was left to the limited protection accorded him by the customary law of war that the innocent civilian should be spared as much as possible and not deliberately attacked as such. Modern methods of warfare had done little to enhance the value of that limited protection. The Genocide Convention, 1948, is manifestly applicable to war conditions between States belligerents but the definition of genocide is narrow, specific and designed to meet the activities at Auschwitz and not those at Hiroshima. Moreover, the four Geneva Conventions of 1949 do not, except in a very marginal area, apply to combat situations but to those where civilians and other war victims are in the hands of the opposing belligerent. Further, in strict juridical analysis neither the Genocide nor the Geneva Convention purports to confer direct international law rights upon individuals. They do impose legal duties on such individuals not to commit "grave breaches" of the latter or genocide contrary to the former. For such acts individuals are liable to trial, conviction and execution. The inter-State enforcement of these instruments, where the correlative rights and duties of international law lie, is decidedly weak. These Conventions, admirable in many ways, are stern with individual human beings, for whose benefit they have been concluded, but decidedly gentle with States, which treat human begins inhumanly. Such is not the characteristic of the regime of Human Rights as we have come to understand it in recent years.

Attempts in the post-1945 era to secure international law protection of civilians from the effects of military operations, extended as they are by nuclear weaponry and the select armoury of chemical and bacteriological devices, have not so far been successful. The Draft Project of Rules for the Protection of the Civilian from combat, put forward by the ICRC in 1956, evoked no response from Governments. The reaffirmation of certain minimal general principles of law whereby States belligerents should spare the civilian population as far as possible and avoid deliberate attacks upon them seems to be about the achievement so far. A further endeavour in this direction was made at the

Geneva Conference of Government Experts this year, but it cannot be said that the progress made to date is anywhere near that required for submission to a Diplomatic Conference of Governments.

It was said by the late Sir Hersch Lauterpacht that if International Law is the weakest point of all law then the Law of War is virtually its vanishing point. If, however, one considers the nature of the activity this Law seeks to regulate, and that the Law seeks to preserve some elementary kind of balance between military needs and the requirements of humanity, then one must admit that its task is formidable indeed. "How to kill your fellow human beings in a nice way" has been described by some cynics as the concern of the Law of War. Moreover, the very state of mind that is requisite for close fighting with weapons must be transformed in an instant to a humanitarian standard of behaviour once the adversary is no longer in a position to fight. That demands a high standard of discipline by belligerents. Moreover, to the extent that modern technology uses instrument control of long range weapons, the effect of the weapon is not visible to those who employ it. That gives a certain technical detachment in weaponry use that is not easily subjected to humanitarian considerations.

A further criticism launched against the attempt to regulate combat conduct by law is that, if armed aggression be criminal, then why bother with distinctions between the legal and illegal methods of carrying out a criminal activity? Unfortunately, there is always a victim of such aggression and not every soldier in the forces of an aggressor State can be saddled with legal responsibility for that aggression. Further, the dictates of humanity in the de Martens Preamble to the Hague Convention No. IV of 1907 have to be considered at every stage of the armed conflict. Aggressive States do not fight themselves and war can never be less than a bilateral activity. In the arena of the new weaponry attempts to secure legal limitation of their employment, generally, or against civilians, are met by the rejoinder that disarmament control is the proper method to employ. Anything else, it is urged, is manifestly unrealistic.

I venture to suggest that the revision of the Law of Armed Conflict after the conclusion of the Geneva Conventions in 1949, had come perilously near to stagnation before the impact of the movement for a regime of Human Rights was brought to bear. State initiatives for the improvement of the protection of the human being in time of war were not apparent. What I think has

happened is that, starting with the Universal Declaration of Human Rights in 1948, a transitional instrument somewhere between a legal and a moral ordering, we have witnessed an escalating movement in international law of a system of rules designed to secure to every human being at the hands of the State upon which he depends, or in which he is located, defined standards of good treatment and not merely the prohibition of the grosser forms of maltreatment. The method adopted was to list and define those fundamental human rights which ought to be accorded to all by reason of the dignity and worth of all human beings. The U.N. International Covenants of Civil and Political Rights, on Economic, Social and Cultural Rights of 1966, and the Convention for the Elimination of All Forms of Racial Discrimination, 1965, have placed the humanitarian philosophy and ethic well within the system of international legal norms. On the regional level the European Convention of Human Rights, 1950, has not only defined human rights with their necessary delimitations, but has also set up international forums for the hearing and determination of allegations of denial of such rights at the hands of the Government concerned. In time, the customary law standards for the good treatment of aliens by States will be transcended by the new conventional system of enforceable human rights at the initiative of any aggrieved individual or group within the jurisdiction of a State that has subscribed to the Convention. This is the shape of things to come, although there is a long way to go yet. At the moment the international system is somewhat weak in the machinery of enforcement and relies heavily upon the educative effects flowing from the existence of the Convention. The regional system is considerably stronger in the matter of enforcement, but its processes are lengthy and it operates within a small group of States sharing certain common values and traditions. However, the European system has had a markedly beneficient effect in municipal law of States in that these same human rights find a place in their respective Constitutions. It is one of the strange consequences of decolonisation that a number of newly independent States have inherited the European ideas of human rights from their former Metropolitan Powers in Europe.

Within the space of the last decade there has been an increasing awareness that where State revision of the Law of War had failed, State responsiveness to augmenting the regime of Human Rights could go some of the way to make good that defect. By a series of resolutions at Red Cross Conferences, by U.N.

Conferences on Human Rights, and by resolutions of the General Assembly of the U.N. a bridge has been built between the Human Rights system and the Law of Armed Conflicts. It seems to have been realized, not all at once, that what could not be achieved through a general revision of the law of War might be partially secured by regarding the Law of War as something essentially complementary to the Human Rights regime. Mankind has become convinced that the betterment and fuller development of the human personality demanded the definition and safeguarding of fundamental human rights on the international level, in time of normality, in civil society.

Two factors seem to have led to the idea that a modified human rights system might be possible even in time of armed conflict. War, from its nature, presents the supreme denial of human rights and the maximum occasion for inhumanity. At the same time prohibitions had been introduced in the later history of the Law of War to mitigate this inhumanity, at least so far as they were consistent with the existence of military needs in war. The modern system of human rights is seeking to become the normal ordering of society. Its approach to war is as something exceptional, something derogatory to itself, but nevertheless temporary and to be confined at every point. The contemporary approach of the Human Rights Regime to the Law of War can be seem in Art. 15 of the European Convention of Human Rights: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

"No derogation from Article 2 (the right to life) except in respect of death from lawful acts of war, or from Article 3 (no torture or inhuman treatment), 4 (1) (no slavery or servitude), and 7 (no crime without a law, international or municipal existing at the time of commission) shall be made under this provision." The state of emergency is to be notified to the Secretary-General of the Council of Europe. A partially similar system is inserted in the U.N. Covenant on Civil and Political Rights, 1966, not yet in force.

Thus, under Art. 15 of the European Convention, the whole of the Law of War as to killing has been incorporated by reference. That Law may therefore have to be considered by the European Commission and the Court. Also, the right of the organs of a

Government to take life during the existence of an internal armed conflict is allowed and controlled by Article 2 (2) (c) of the European Convention, i.e., "in action lawfully taken for the purpose of quelling a riot or insurrection." It is to be noticed that such action is part of the qualification of the definition of the right to life, and therefore no question of derogation arises. Thus, Article 15 is here spelling out the new philosophy of the essential relationship between the Law of Armed Conflicts and that of Human Rights. The latter is the normal ordering of civil society. The Law of War, international or internal, is the exceptional situation derogating from the full application of the Human Rights system. The two systems are essentially complementary, and that is an end of the old dichotomy between the Law of War and the Law of Peace into which International Law was traditionally divided. We have moved a long way.

We have, it would seem, almost come back to the mediaeval theory that war was a dislocation of the normal order of society and that the Law should therefore confine its scope, limit those who have the right to take part in it, what they may do in the waging of it, and to whom and to what they do it. That is what the Law of War is about. To the mediaeval theologian-jurist total war was by definition unjust. If, as St. Augustine pointed out, war is an evil then let the law confine it. This position has an effect upon the actual content of the Law of War. There is the 19th century approach that war is fought for the purpose of overpowering the adversary to enable the victor to impose its will upon the vanquished. That which is not expressly forbidden by the Law is licit as long as it is shown to further the military purpose. There has been another approach which become apparent during the war crimes trials after the last war. By this, all acts in war on the territory of another State which would, apart from war, be criminal by the municipal law of that State, must take their stand in legitimacy under the Law of War. If they fail, they stand condemned. Thus, if the killing by enemy soldiers cannot be justified by the law of War, then criminal it remains under the local municipal law. That is the direct opposite approach to that which requires the killing to be a violation of the Law of War, as approach seen in considering the Law of Aerial Warfare. It makes a deal of difference which approach is adopted because some matters of Law are uncertain. In the defence of superior orders it may have the effect of shifting the burden of proving the illegality by the prosecution to proving the legality by the accused. The de Martens formula in the Hague Convention, 1907,

negatives the approach that all which is not expressly forbidden by the law is licit. Again, Art. 22 of that Convention supports de Martens: "Belligerents have not got an unlimited right as to the choice of means of injuring the enemy."

Not only has the Human Rights system afforded a fundamental and novel approach to the Law of War and its revision, but it has promoted a bridge of common effort by a number of different non-Governmental bodies working for that revision. The awareness among the percipient that respect for human rights cannot be fragmented into time of peace and of war and that such rights are under maximum threat in time of war, together with contemporary political and technological developments, led to the following position: The regime of human rights will come in time to be the normal ordering in civil society; if war breaks out, inter- or intra-State, that regime does not dissipate. First, it is there waiting in the background the whole time to take over once the conflict abates. Second, a lower level of that regime then comes into play by way of derogation made strictly necessary by the emergency situation. That lower regime is the Law of Armed Conflicts. Third, the Law of Armed Conflicts must be reviewed and revised in the light of the two preceding propositions. That review will go in two main directions: (1) That which cannot be strictly allowed by the Law of Armed Conflict stands to be condemned if it violates the law of Human Rights; (2) that part of the Law of Armed Conflicts which is humanitarian in character, quite a large part today, needs overhaul to lift it up to the closest proximity to the normal operation of Human Rights.

Thus the Law of Armed Conflicts is not alien to that of Human Rights but complementary to it. It must remain with us until man has learnt to avoid recourse to the scourge of war as a means of settling disputes. To some, no doubt, this is too ambitious an approach. For all that, and it is yet in the future, we must I suggest, seek to establish it. This means that establishment of more and better defined human rights, more securely enforced, and a more humanitarian Law of Armed Conflicts more regularly and effectively supervised and enforced.

This Human Rights approach to the Law of Armed Conflicts revision can be seen in the general use of the term "International Humanitarian Law in Armed Conflicts." This title goes some way to suggesting that we have made part of the journey I have been attempting to portray here.

Of all the many topics of the Law of War that call for revision

in the direction of increased protection for the individual the one that is perhaps the most salient is the method of enforcement of the Law. It is to little purpose to augment the content of Humanitarian Law unless better enforcement can be assured. This is to encourage human expectations only to deny them. It is here that the ideas implicit in Human Rights Law may provide some new mechanisms not found in the classical modes of enforcement of the Law of War. These have been, supervision by the Protecting Power, the device of reprisals, trials of violators, and compensation. On two occasions only, has the modern Law of War been enforced by international tribunals, namely, at Nuremberg and Tokyo. These trials were consensual, *ad hoc*, composed of judges of the victor States with an assigned corpus of law upon which the Indictments were based.

Reprisals are the most traditional method of enforcement and probably the method most antagonistic to the idea of Human Rights, for the punishment falls upon the innocent as well as the wrongdoers. The Geneva Conventions of 1949 have eliminated this device as against the defined classes of war victims protected therein. The Combat Law retains reprisals as the central method for its enforcement, with results that have often aggravated the criminality of the belligerents. However, by reason of the weakness of the other methods of enforcement, it is perhaps not yet the time for the total abolition of reprisals from the Law of War, although there is a strong body of opinion that would so advocate. What is being done at this moment is to seek the establishment of a general principle of law, possibly in a General Assembly Resolution, that reprisal action directed against innocent civilians, as such, should be prohibited. The attempts to define "innocent civilians" have not been noticeable for their success.

The trial of war criminals by enemy tribunals was a large scale activity after the last war, hardly commensurate with the vast scale and nature of the abominations to which the whole apparatus of the Third Reich lent itself with enthusiasm and energy. The worst of these, the extermination of 6 million, of the total nine million, Jews in Europe, had no connection at all with combat operations. The Geneva Conventions, 1949, by requiring the trial of perpetrators of "grave breaches" of the Conventions by ordinary national tribunals, including military courts, has without doubt removed the undesirable *ad hoc* special national tribunals with dubious procedures and permissive rules of evidence, but at the expense of eliminating international penal

tribunals. It was a classic case of "throwing the baby out with the bath water". Today, the establishment of such international tribunals for the large class of war crimes covered by the definition of grave breaches of the Geneva Conventions would require a Protocol of Revision adopted by the 128 States now Parties to those Conventions. In other words, a Nuremberg-type international penal tribunal would have a very limited jurisdiction today, possibly only in respect of crimes against peace and one or two esoteric types of war crime. Genocide is triable solely by the national courts of the country in which it is committed, until we have an international penal tribunal. As genocide is normally beyond the resources of private enterprise and requires State support, the Convention is a minimal reality.

What may be more feasible today than an international penal tribunal is some international fact-finding body which reports to the U.N. The presence of such a body without the consent of the host State presents major difficulties. Soviet claims for maximum sovereignty do not help in this proposal. The traditional Protecting Power system of enforcement has virtually broken down. Without it a large part of the enforcement machinery in the Geneva Conventions, 1949, is inoperative. The demand for some sort of international Protecting Power, within, but independent of, the U.N. structure is real and urgent. Continual pressure for such a body by way of General Assembly resolutions may be persuasive in time but it will be a long business. Such an international Protecting Power would not only supervise the application of the Law but would report the facts of violations of it to the U.N. Because of that activity it is apparent that some States will continue to deny the presence of such a body in their territory without their consent. Without a presence, facts cannot be found. War crimes trials leave much to be desired as a method of enforcement. They should be reserved for the grosser types of criminality. The trouble is, in part, that the humanitarian philosophy is not at its best when it has to consider penal measures. Such are alien to its outlook. Here the importance of dissemination and instruction, required by each of the four Geneva Conventions of 1949, is manifest. States have been reluctant to take these obligations seriously and some token instruction is all too common. Much could be done to improve this mechanism of enforcement. The educative effect of awareness of human rights and humanitarian prohibitions in peace and in war is powerful and can perhaps, in the long run, do more to secure improved enforcement by preemption, than trials and

death penalties. Trials by enemy courts, let alone by the belligerent's own courts, often evoke sympathy for the accused. Trial depends upon many haphazard events, and the punishment awarded no less so. Instant trials debar the accused from evidence necessary for his defence. Trials after the conflict may entail protracted periods of pre-trial custody.

There seems little reason why instruction and even examination in the Law of Armed Conflicts as a whole, and in the Geneva Conventions in particular, should not be instituted in armed forces. Promotion and Staff College entrance examinations might well include a paper on this subject alongside the existing paper on Military Law which is currently mandatory in the U.K. If trials are to remain a method of enforcement, then instruction in the Law of Armed Conflicts will reduce the scope of the defence of superior orders to vary narrow limits. States might be requested to make regular reports to the U.N. of the measures they have taken to carry out their instruction obligations under the Geneva Conventions. Encouragement might be given to include such study in Colleges of Advanced Education and in Universities to meet the existing legal obligation to instruct the whole civilian population "if possible".

The enforcement of humanitarian law in internal conflicts presents great difficulties but is no less essential. Here governments display maximum sensitivity. At the moment rebel status remains under municipal law, however exemplary the conduct of the insurgents. This may have been a persuasive factor in getting States to accept the one Art. 3, in the Geneva Conventions dealing with internal conflicts, but it did nothing to persuade the rebels, not Parties to those Conventions, to carry out the terms of Art. 3, if the response be trial and execution as a rebel.

CONCLUSIONS

The essential nexus between the Law of War and the Human Rights Regime has been made in theory. The Law of War is a derogation from the normal system of Human Rights, at the moment fragile when universal and unduly elaborate when regional and effective. The revision of the Law of War has now been seen through the perspectives of Human Rights. International Humanitarian Law, the expression, in Law, of a contemporary international morality based upon the essential value of the human being, transcends war and peace. The way ahead has been seen and the agencies through which the endeavour is to be made are known. What we now need is intensive, sober and

pragmatic studies as to the modalities for the extension of the Human Rights regime to the Law of Armed Conflicts. Above all, we need studies, from many sources, of the pressures and factors that are persuasive for the humanitarian law observance. Penal processes are one method only. The widest and most penetrating educative measures should be tried; persistent and skillful pressures made upon public opinion everywhere. At the moment these pressing matters receive but fragmentary attention from the U.N., the ICRC and related bodies. The relationship between Human Rights Law and that of Armed Conflicts must now be exploited with patience, skill, determination and despatch, if man's confidence in man is to be made a living reality and part of our civilization.

12 July 1971

COMMENTS

THE COURT OF MILITARY APPEALS: A SURVEY OF RECENT DECISIONS*

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This comment examines the work of the United States Court of Military Appeals from January 1970 to August 1971. This survey attempts to provide an overview of the work of the Court. Not all cases decided by the Court are discussed. In some instances cases are discussed under two different topic headings. Of necessity factual summaries are brief and may omit significant details.

While hindsight will be needed to write the comprehensive history of the Court of Military Appeals during this period it seems safe to say that the court decided few, if any, "big cases." No Supreme Court *Miranda* or *O'Callahan* decisions forced the judges to reexamine military criminal justice. No decisions comparable to *United States* v. *Care* or *United States* v. *Donohew* mandated immediate and significant procedural changes in large numbers of courts-martial. Rather the period was marked by clarification and narrowing of prior significant decisions. The explanation of counsel rights, the scope of the *O'Callahan* decision, the protection against unlawful search and seizure and the scope of extraordinary relief all benefited from this interstitial decision-making. Several significant decisions in such areas as corroboration of confessions and the admission of prior convictions stemmed from the 1969 revision of the Manual for Courts-Martial. In a few areas the Court did break new ground. Significant decisions determined the admissibility of Article 15 punishments at sentencing, the propriety of defense counsel argument for a bad conduct discharge and the limitations upon the use of deposition evidence. Strong dissents highlighted the

*The opinions and conclusions presented herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any governmental agency.

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fundamental difference of opinion between the judges in these areas.

Two personnel changes marked the period under consideration. Judge Darden assumed the Chief Judgeship from Judge Quinn and Judge Ferguson completed the service of his term. The confirmation of Ohio Supreme Court Justice Robert Duncan has returned the Court to full strength.

I. JURISDICTION

A. *O'CALLAHAN INTERPRETATION*

After a period of intense activity in late 1969 the rate of opinions interpreting *O'Callahan* v. *Parker* [1] slowed considerably. Among the factual situations considered by the Court of Military Appeals as governed by *O'Callahan* and thus not susceptible to military jurisdiction were: (1) offenses involving the illegal importation into the United States of marihauana [2]; (2) the off-post sale of marihuana and LSD to a civilian [3]; (3) an interstate auto theft charge despite the fact that the car involved was owned by a serviceman [4]; and (4) an off-base killing and assault involving military dependents as victims.[5]

The Court's most significant *O'Callahan* decision was *Mercer* v. *Dillon*.[6] There over the vigorous dissent of Judge Ferguson the court held that *O'Callahan* was retroactive only as to convictions not final before 2 June 1969, the date of the *O'Callahan* decision. In essence, the majority felt that prior good faith reliance by military authorities and the massive disruption entailed by a contrary ruling opposed a grant of full retroactivity. In a minor administrative exception to the *Mercer* rule, *Brant* v. *United States* [7] held that Brant was entitled to the same *O'Callahan* relief as his co-actor despite the fact Brant's conviction had become final before 2 June 1969.

A final by-product of *O'Callahan* was *Enzor* v. *United States*.[8] Defendant's court-martial conviction, invalid under *O'Callahan* standards, was affirmed by a board of review prior to June 1969. No request for review was made to the Court of Military Appeals.

[1] 395 U.S. 256 (1969).
[2] United States *v.* LeBlanc, 19 U.S.C.M.A. 381, 41 C.M.R. 381 (1970); United States *v.* Pieragowski, 19 U.S.C.M.A. 508, 42 C.M.R. 110 (1970).
[3] United States *v.* Morley, 20 U.S.C.M.A. 179, 43 C.M.R. 19 (1970).
[4] United States *v.* Wills, 20 U.S.C.M.A. 8, 42 C.M.R. 200 (1970).
[5] United States *v.* Snyder, 20 U.S.C.M.A. 102, 42 C.M.R. 294 (1970).
[6] 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).
[7] 19 U.S.C.M.A. 493, 42 C.M.R. 95 (1970).
[8] 20 U.S.C.M.A. 257, 43, C.M.R. 97 (1971).

After the *O'Callahan* decision was announced, a petition for coram nobis was taken to the newly designated Court of Military Review. On differing theories a majority of the Court of Military Appeals held that Enzor was entitled to no relief since the *O'Callahan* decision was not retroactive. Judge Ferguson dissented. He noted that Enzor did not receive a copy of the board of review decision until 9 June 1969. Therefore, finality could not attach until after the prescribed thirty-day period to seek review from the Court of Military Appeals, a date well after the *O'Callahan* decision. Judge Ferguson also renewed his *Mercer* objection to limiting retroactivity on a jurisdictional question.

B. *OTHER JURISDICTIONAL MATTERS*

The other significant jurisdictional case was *United States* v. *Averette*.[9] In a seeming reversal of prior declarations, the court ruled that the Vietnam conflict was not a "time of war" for purposes of UCMJ, article 2(10), granting military jurisdiction over persons serving with or accompanying an armed force in the field in time of war. Accordingly, a civilian employee of an Army contractor was not subject to military trial for his theft of government property.

Two cases considered the effect on military jurisdiction of a serviceman's claimed discharge. *United States* v. *Leonard*[10] followed well established precedent in holding that in the absence of a discharge certificate, previously initiated disciplinary proceedings could continue beyond the man's separation date. A harder question on the facts was presented in *United States* v. *Hout*.[11] Here the defendant was scheduled to be released from service on 14 January 1968. Three days earlier an administrative hold had been placed on him in connection with certain discrepancies in funds entrusted to his care. Charges were not preferred until 30 September 1968 and trial was held on 11 December of that year. The majority noted "When no good cause exists to retain [a defendant] beyond expiration of the enlistment, the serviceman may demand his release, and the Government is bound to grant it. However, if the Government does not affirmatively act to effect his discharge and the accused is satisfied to remain on active duty, the existing status is continued." Based on evidence of Hout's regular reporting for duty, drawing of pay, and requesting leave the Court found that he had con-

[9] 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).
[10] 19 U.S.C.M.A. 353, 41 C.M.R. 353 (1970).
[11] 19 U.S.C.M.A. 299, 41 C.M.R. 299 (1970).

tinued his military status and remained subject to the Uniform Code of Military Justice. Once charges were filed on 30 September, his absolute right to separation became a qualified one. Judge Ferguson dissented claiming the government failed to follow its own regulations. He read the facts of the case as indicating reluctant obedience to orders by a defendant unaware of his right to demand a discharge.

The authority of a commanding officer to convene a special court-martial was successfully challenged in *Greenwell* v. *United States*.[12] The Court held that UCMJ, article 23(a)(7)'s delegation of power to an officer in command "when empowered by the Secretary concerned" was to be read literally. Accordingly, the Commanding General at Camp Pendleton could not of his own accord delegate special court-martial power to the commanding officer of a student company at the camp.

Federal court-military court interplay was involved in *United States* v. *Goguen*.[13] A general court-martial had convicted Goguen for failure to put on a uniform and AWOL. Shortly thereafter a New Jersey federal district court granted a writ of habeas corpus ordering Goguen's discharge from the Army for a prior improper denial of conscientious objector status. The United States Attorney did not request review from the United States Court of Appeals. When Goguen's court-martial conviction reached the Court of Military Appeals, the district court order had become final. COMA concluded that under the circumstances the court-martial proceedings had to be terminated, the findings and sentence set aside, and the charges dismissed.

II. COUNSEL RIGHTS

The Court made several pronouncements with respect to counsel during the survey period. The first category of cases dealt with the sanctity of the attorney-client relationship. The Court was most concerned with conduct evidencing less-than-the-highest regard for the attorney-client relationship. It held in *United States* v. *Murray*[14] that an accused may not be deprived of the services of his appointed counsel because of a routine change of assignment. Even more objectionable was the "shuttling about" of counsel in *United States* v. *Gaines*,[15] reversed on other grounds. Gaines was first represented by Captain A. A was then made

[12] 19 U.S.C.M.A. 460, 42 C.M.R. 62 (1970).
[13] 20 U.S.C.M.A. 527, 43 C.M.R. 367 (1971).
[14] 20 U.S.C.M.A. 61, 42 C.M.R. 253 (1970).
[15] 20 U.S.C.M.A. 557, 43 C.M.R. 397 (1971).

deposition officer and Captain B represented accused at the deposition. At trial, Gaines was represented by Captain C. There was no explanation for these changes in counsel and the Court felt it demonstrated a "callous disregard for the nature of the attorney-client relationship."

In *United States v. Johnson*,[16] accused, being tried in Vietnam, requested counsel for his article 32 investigation and received Captain A. After charges were referred, accused requested Captain A as his counsel. At the same time, a deposition was scheduled and Captain B was detailed to represent accused. A postponement of the deposition was requested so the request for Captain A could be acted upon. The request for the postponement was denied, and at trial accused was represented by Captain B without objection. On appeal, the Court found no abuse of discretion in denying the postponement because the deponent witness was about to depart the country and it was known to accused that Captain A would probably not be available at accused's trial. In a vigorous dissent, Judge Ferguson, the strongest advocate of the sanctity of the privilege, protested the majority's willingness to ignore a defendant's right to counsel of his choice.

In *United States* v. *Courtier*,[17] the Court found the accused had not been prejudiced by the denial of his request for individual military counsel at the article 32 investigation. He had had the benefit of his requested counsel both before and after trial as assistant defense counsel and with his advice had entered a plea of guilty. However, where accused's request for counsel was denied and that counsel was subsequently assigned as trial counsel, the Court did find prejudice. In *United States* v. *Collier*,[18] accused had talked to the requested counsel and then asked for him at the article 32 investigation. Counsel did not recall the conversation and was on R&R at the time of the article 32. The Court held that when he was appointed as trial counsel, the government had effectively deprived accused of the opportunity to request this attorney. Prejudice was found and the case was reversed.

The Court also considered the explanation at trial as to an accused's rights to counsel. It was held that failure to orally advise the accused of his rights in accordance with *United States* v. *Donohew*,[19] and to accept instead a written form signed by

[16] 20 U.S.C.M.A. 357, 43 C.M.R. 199 (1971).
[17] 20 U.S.C.M.A. 278, 43 C.M.R. 118 (1971).
[18] 20 U.S.C.M.A. 261, 43 C.M.R. 101 (1971).
[19] 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969).

accused and detailing the rights was error.[20] Also rejected was the approach in *United States* v. *Carter*[21] in which the defense counsel stated the *Donohew* rights before the judge who then received an affirmative answer from the defendant that he understood the advice given by counsel.

The outer limits of *Donohew* were suggested in *United States* v. *Turner*.[22] There the military judge advised the defendant of his right to a civilian or military counsel of his own choosing but failed to mention that the detailed counsel could continue to serve with the selected counsel. The defendant stated that he did not want civilian counsel and was satisfied with his detailed counsel. Under these circumstances, the Court found it a meaningless formality to require the explanation omitted by the military judge. Judge Ferguson disagreed claiming that *Donohew* required a defendant's response to each and every element of the right to counsel. Turning to practicalities he felt it entirely possible that defendant might have wanted counsel of his own selection but was afraid to lose the substantial benefits gained from his pretrial association with the detailed counsel.

In cases dealing with the detail of counsel, the Court found that it was not prejudicial per se for trial counsel to be the deputy staff judge advocate and endorser of the efficiency reports of the defense counsel.[23] In another case, the original convening order detailed opposing counsel, neither of whom were qualified under UCMJ, article 27(b). An amending order appointed qualified counsel in their place. The Court held that there was no need for a written explanation for the assignment of unqualified counsel when amending orders assign qualified counsel before trial. In the same case, the accused waived an issue as to the legality of the convening order which was signed "by direction" by failing to object.[24] The Court also held that an appointing order correctly designating the role of counsel is a jurisdictional necessity.[25] Finally, it was held to be error, but not prejudicial on the facts of the case, for the military judge to prevent assistant defense counsel, not qualified, from participating in the case.[26]

[20] United States *v.* Bowman, 20 U.S.C.M.A. 119, 42 C.M.R. 311 (1970). *See also* United States *v.* Goodwin, 20 U.S.C.M.A. 160, 42 C.M.R. 352 (1970).
[21] 20 U.S.C.M.A. 146, 42 C.M.R. 338 (1970).
[22] 20 U.S.C.M.A. 167, 43 C.M.R. 7 (1970). The following cases followed Turner: United States *v.* Baker, 20 U.S.C.M.A. 175, 42 C.M.R. 15 (1970); United States *v.* Falls, 20 U.S.C.M.A. 618, 44 C.M.R. 48 (1971).
[23] United States *v.* Hubbard, 20 U.S.C.M.A. 482, 43 C.M.R. 322 (1971).
[24] United States *v.* Moschella, 20 U.S.C.M.A. 543, 43 C.M.R. 383 (1971).
[25] United States *v.* Coleman, 19 U.S.C.M.A. 524, 42 C.M.R. 126 (1970).
[26] United States *v.* Flood, 20 U.S.C.M.A. 148, 42 C.M.R. 340 (1970).

Two cases considered the adequacy of *pretrial* explanations of counsel rights. In *United States* v. *Estep*,[27] defendant was implicated in a motor vehicle hit and run accident. After advisement by a CID agent of his counsel rights, he indicated that he wished to consult with counsel. Estep was released and talked with counsel. Two days later, upon request of the CID, Estep appeared in an agent's office. He was again given an adequate warning of rights including the right to have counsel present at the interview. Estep said his lawyer had advised him to make no statement "but that he still wanted to talk." The CID agent informed Estep that he could stop talking at any time. Statements from this conversation were admitted without objection at trial. Estep contended on appeal that MCM, 44*h*, requires that the CID agent should have dealt with him through his counsel. The Court rejected this argument noting that a defendant can waive the presence of counsel. Here the circumstances showing a knowing and voluntary waiver were patent.

The pressures of time dictated a somewhat unusual proceeding in *United States* v. *Flack*.[28] Flack was charged with the robbery of $250 from Specialist Grimaldi. Due to Grimaldi's impending discharge from service, it was decided to take his oral deposition. Counsel was appointed "to represent the accused in the taking of this deposition" on 19 November. On 20 November defendant was interrogated by CID agents and supplied a written statement to them. Prior to interrogation, a complete rights warning was given to Flack. He stated he understood his rights, did not want counsel and consented to questioning. The record indicates that during the course of the interrogation the appointed trial counsel became aware of the questioning but made no efforts to interrupt it. At trial Flack sought to suppress the pretrial statements on two grounds: (1) the trial counsel should not have permitted the interrogation to continue knowing that counsel had been appointed and (2) no interrogation could proceed without notice to defendant's attorney. Waiver by the defendant was impossible because he was not aware that specific counsel had been appointed to represent him. The Court rejected Flack's arguments. It held that defense counsel had been appointed for the limited purpose of representation at the deposition. Since Flack had not accepted him as attorney for any other purpose, the attorney was not entitled to notice of the CID interrogation. In addition, the Court found that Flack had knowingly, intelligently, and vol-

[27] 19 U.S.C.M.A. 201, 41 C.M.R. 201 (1970).
[28] 20 U.S.C.M.A. 201, 43 C.M.R. 41 (1970).

untarily waived his right to the presence of counsel at his interrogation.

In a vigorous dissent, Judge Ferguson scored the reluctance of the Court to apply *Miranda* v. *Arizona*.[29] Judge Ferguson disagreed with the majority's conclusion that a knowing and intelligent waiver had occurred. "True enough, he was given a recitation of his right to the advice and assistance of counsel at the interview but one most important aspect of that advice was lacking—the fact that counsel had already been appointed to defend him and was at that very time on his way to the place of interrogation." Judge Ferguson further argued that MCM, 44*h*, should preclude anyone involved in the investigation or trial of a case from interrogating the accused without the permission of the defense counsel.

III. GENERAL PROCEDURE

A. *GUILTY PLEAS*

The guilty plea continued to be a problem for military judges. The most troublesome area concerned statements of the accused inconsistent with his plea of guilty. In *United States* v. *Dunbar*,[30] the accused pleaded guilty to communicating a threat. However, he stated he had made the statement to attract a guard's attention while he was locked in his cell. This was inconsistent with the present intent to injure the guard required for conviction. The plea was not provident. Similarly, in *United States* v. *Woodrum*,[31] a statement that "I thought they were firing at us" was potentially inconsistent with a plea of guilty to assault with a dangerous weapon. Since self-defense was raised, reversal was required. Likewise in *United States* v. *Bernier* [32] and *United States* v. *Saplala*,[33] inconsistent statements setting up self-defense negated the guilty plea. In another case, testimony that the accused did not intend to permanently deprive the victim of a rifle was inconsistent with a plea of guilty to robbery.[34] A statement by accused that he had "started back" in compliance with an order negated his guilty plea to disobedience to orders.[35] Insanity raised during sentencing rendered improvident the guilty

[29] 384 U.S. 436 (1966).
[30] 20 U.S.C.M.A. 478, 43 C.M.R. 318 (1971).
[31] 20 U.S.C.M.A. 529, 43 C.M.R. 369 (1971).
[32] 20 U.S.C.M.A. 623, 44 C.M.R. 53 (1971).
[33] 19 U.S.C.M.A. 344, 41 C.M.R. 344 (1970).
[34] United States *v.* Juhl, 20 U.S.C.M.A. 327, 43 C.M.R. 167 (1971).
[35] United States *v.* Woodley, 20 U.S.C.M.A. 357, 43 C.M.R. 197 (1971).

plea in *United States* v. *Batts*.[36] Mitigation testimony failing to show intent to shirk important service or to remain away permanently negated a guilty plea to desertion.[37] A guilty plea to smuggling contraband into a jail cell was rendered improvident by evidence showing that accused was actually apprehended before he entered the cell.[38] Finally, an improvident guilty plea to a lesser included offense did not prejudice an accused found guilty of the offense charged.[39]

In a related area, the inability of the accused to recall all of the events of the crime did not preclude a guilty plea. He may plead guilty if he is convinced that the strength of the government's case is "such as to make assertion of his right to trial an empty gesture." [40]

It was also held that inadvertent failure to take the accused's plea does not require reversal. The government proceeded with its case and accused was found guilty. The Court held that the article 45 requirement for recording the guilty plea is not of jurisdictional magnitude, but merely to insure that a trial on the merits is had when the accused fails to enter a not guilty plea in his own behalf.[41]

The Court also dealt with several matters of procedure concerning the guilty plea. Advice by the military judge in a rehearing which may have overstated the maximum punishment by one month did not negate the guilty plea.[42] Failure to inform the accused that his plea waived the right to a trial of facts by a court-martial was not prejudicial when the accused had earlier been informed of his right to trial by a court composed of commissioned officers and enlisted men and that his plea of guilty would result in a finding of guilty.[43]

United States v. *Care* [44] continued to be troublesome, with several cases [45] dealing with the issue of compliance with *Care*,

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[36] 19 U.S.C.M.A. 521, 42 C.M.R. 123 (1970).
[37] United States *v.* Cuero, 19 U.S.C.M.A. 398, 41 C.M.R. 398 (1970).
[38] United States *v.* Lowery, 19 U.S.C.M.A. 245, 41 C.M.R. 245 (1970).
[39] United States *v.* Brooks, 21 U.S.C.M.A. 3, 44 C.M.R. 57 (1971).
[40] United States *v.* Butler, 20 U.S.C.M.A. 247, 43 C.M.R. 87 (1971); United States *v.* Luebs, 20 U.S.C.M.A. 475, 43 C.M.R. 365 (1971).
[41] United States *v.* Taft, 21 U.S.C.M.A. 68, 44 C.M.R. 122 (1971).
[42] United States *v.* Darusin, 20 U.S.C.M.A. 354, 43 C.M.R. 194 (1971).
[43] United States *v.* Bingham, 20 U.S.C.M.A. 521, 43 C.M.R. 361 (1971).
[44] 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).
[45] United States *v.* Kilgore, 21 U.S.C.M.A. 35, 44 C.M.R. 89 (1971); United States *v.* Hook, 20 U.S.C.M.A. 516, 43 C.M.R. 356 (1971); United States *v.* Rumpler, 19 U.S.C.M.A. 479, 42 C.M.R. 81 (1970); United States *v.* Jagow, 19 U.S.C.M.A. 503, 42 C.M.R. 105 (1970); United States *v.* Wilson, 19 U.S.C.M.A. 498, 42 C.M.R. 100 (1970); United States *v.* Wimberly, 20

particularly delineation of the elements of the offense. Finally, *United States* v. *Palos* [46] held that failure to find and note for the record that accused made a knowing, intelligent and conscious waiver of his rights with his plea of guilty was not error. Rather, when an examination in accordance with *Care* is made to establish the factual bases for a ruling that the plea is voluntary, that ruling itself manifests the required determination and there is no need to recite it for the record.

B. *RECORDS OF TRIAL*

In *United States* v. *Napier*,[47] before authenticating the transcript of trial, the military judge did not note that a part of the proceedings preliminary to the plea had been omitted. While the case was pending before the Court of Military Review, the judge filed a certificate of correction. The Court of Military Review struck the certificate, and concluded that without the omitted portion the conviction could not stand.

The Court first held that the certificate of correction should not have been stricken. It was intended to show what actually transpired and could have been ignored only if it referred to an event that did not take place at trial. However, this portion of the decision was not challenged by the government so the Court considered the record without the certificate. The record had the following omissions: (1) the military judge's advice that the accused would be arraigned; (2) the question whether accused desired to have the charges read and his waiver of the reading; (3) the charges and specifications were not set out "verbatim," *i.e.*, they did not indicate the name and description of the accused; did not set out the affidavit of the accuser; and did not describe the reference of the charges to trial. The Court found no prejudice to accused. The defense had a copy of the charges and discussed them with accused. As to the affidavit of the accuser, an accused can be tried on unsworn charges in the absence of objection. Finally, on the reference to trial, an oral reference is acceptable.

Also dealing with records of trial was *United States* v. *Platt*.[48] There it was discovered that a mechanical failure had prevented recording of the arraignment and pretrial presentation of the evidence. The military judge declared a "mistrial" and began the trial anew at that point. Judge Quinn held that the substance of

U.S.C.M.A. 50, 42 C.M.R. 242 (1970); United States *v.* Williams, 19 U.S.C.M.A. 334, 41 C.M.R. 334 (1970).

[46] 20 U.S.C.M.A. 104, 42 C.M.R. 296 (1970).

[47] 20 U.S.C.M.A. 422, 43 C.M.R. 262 (1971).

[48] 21 U.S.C.M.A. 16, 44 C.M.R. 70 (1971).

what transpired in the first 39(a) session was recorded, thus obviating any possibility of prejudice to accused. The Manual provides that a mistrial withdraws the charges from the court-martial and returns them to the convening authority for further disposition. Thus, the only impediment to a continuation of the trial was the failure to comply with the requirement of a new pretrial advice and reference of the charges to trial. However, the failure of the accused to object at the time waived such defects. Chief Judge Darden did not consider this to be a mistrial, but rather a repetition of testimony. Judge Ferguson found the error to be jurisdictional and not waivable.

In *United States* v. *Weber*,[49] a reconstructed record of trial was found not to be verbatim within the meaning of article 54 and the case was reversed. A malfunction of the recording equipment resulted in the omission of a substantial part of the record. The law officer reconstructed it "as well as I am able." Faced with the nonverbatim record and a six months' delay at the convening authority level, the Court ordered the charges dismissed.

C. *TRIAL BY MILITARY JUDGE ALONE*

In the area of detailing, the Court held that the detail of multiple military judges to a single court for administrative purposes is not authorized, but found no prejudice to the accused. It also found that the phrase "all cases in the hands of the trial counsel of the special court-martial covered by this command in which trial proceedings have not begun or in which the accused has not requested trial by military judge alone will be brought to trial before the court hereby convened" to contain surplusage and not to prevent trial by military judge alone.[50]

In *United States* v. *Moorehead*,[51] the Coast Guard's method of rotating military judges was found to be defective, because the officer detached did not have as his primary duty that of being a military judge.

Moving to accused's request for trial by military judge alone, it was held that the request for trial by military judge alone must be in writing and failure to do so is a jurisdictional defect.[52] However, when the accused has submitted a request in writing, his defense counsel is presumed to have properly advised him of

[49] 20 U.S.C.M.A. 82, 42 C.M.R. 274 (1971).
[50] United States *v.* Sayers, 20 U.S.C.M.A. 462, 43 C.M.R. 302 (1971).
[51] 20 U.S.C.M.A. 574, 44 C.M.R. 4 (1971).
[52] United States *v.* Mountain, 20 U.S.C.M.A. 319, 43 C.M.R. 159 (1971); United States *v.* Francies, 20 U.S.C.M.A. 291, 43 C.M.R. 131 (1971); United States *v.* Dean, 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970).

his rights, and failure of the military judge to personally elicit assurances from the accused that his request was understandably made, while error, is harmless.[53]

The request in writing requirement was extended in *United States* v. *Rountree*.[54] There the order detailing the military judge carried the name of the military judge, while the judge who heard the case had a different first name. The military judge merely changed the first name on the request and proceeded with trial. The Court reversed, holding that the change of name necessitated a new request in writing for trial by military judge alone.

Finally, one case dealt with challenge of the military judge. The military judge informed the accused and his counsel of his previous connection with the case. Counsel waived the challenge and accused pleaded guilty. The Court refused to reverse, holding that the waiver was effective.[55]

D. *CONVENING AUTHORITIES*

In *United States* v. *Maxfield*,[56] a key government witness was given a grant of immunity by the acting division commander. When the case came for the convening authority's review the division commander had returned. It was held that the review by this division commander was not proper because of the possibility of influence due to his subordinate's action by giving the grant of immunity. In *United States* v. *Bloomer*,[57] the convening authority was found to be an accuser and disqualified from convening the court-martial in the trial of a conscientious objector. This was evidenced by the officer's prior contact with the accused and, more importantly, the fact that following referral of the charges, the officer reconstituted the special court-martial for the case to empower it to adjudge a punitive discharge. Finally, a convening authority who characterized a key government witness as a "reliable Marine" was found to be disqualified from reviewing the record of trial.[58]

E. *STAFF JUDGE ADVOCATE'S REVIEW*

The staff judge advocate's post trial review is an essential part of any court-martial proceeding. Error or inaccuracy in the review may influence the decision of the convening authority.

[53] United States *v.* Turner, 20 U.S.C.M.A. 167, 43 C.M.R. 7 (1970); United States *v.* Jenkins, 20 U.S.C.M.A. 112, 42 C.M.R. 304 (1970).
[54] 21 U.S.C.M.A. 62, 44 C.M.R. 116 (1971).
[55] United States *v.* Wismann, 19 U.S.C.M.A. 554, 42 C.M.R. 156 (1970).
[56] 20 U.S.C.M.A. 496, 43 C.M.R. 336 (1971).
[57] 21 U.S.C.M.A. 28, 44 C.M.R. 82 (1971).
[58] United States *v.* Marks, 19 U.S.C.M.A. 389, 41 C.M.R. 389 (1970).

Since that decision represents the first step in judicial review of the decision, any material that is erroneously included or omitted from the post trial review and which would substantially influence the decision in a manner adverse to the accused constitutes error and will require a new review and convening authority action.

The most common error found by the Court was the failure of the staff judge advocate to advise the convening authority of the accused's company commander's recommendation that the accused not be eliminated from the service. This recommendation was characterized by the Court as a factor "which would have a substantial influence on the decision of the convening authority," and as such, the omission of it required a new review in each instance.[59]

United States v. *Wetzel*[60] concerned an adverse influence on the staff judge advocate in the preparation of the post trial review, and demonstrated again the Court's belief as to the influence the review has on the convening authority. Following Wetzel's trial, trial counsel filed a letter with the officer conducting the clemency review regarding accused's lack of cooperation with the prosecution in another case. The trial counsel also submitted a letter from another attorney who spoke unfavorably of accused. All other post trial reports were very favorable to accused. The staff judge advocate's review made no mention of the trial counsel's documents but disagreed with the recommendation for clemency. The convening authority also disapproved clemency. The Court speculated that the letters probably had an influence on the SJA's recommendation. Recognizing the significance of that recommendation on the convening authority, the Court ordered a new post trial review by a different staff judge advocate and convening authority.

The error in *United States* v. *Collier*[61] was the failure to mention the testimony of a certified non-JAGC attorney that the key government witness in the case was unreliable and that the accused was truthful. Again, reversal for a new review was required.

A potential conflict of roles was discussed in *United States* v. *Marsh*.[62] There the post trial clemency report was prepared by

[59] United States *v.* Rivera, 20 U.S.C.M.A. 6, 42 C.M.R. 198 (1970); United States, *v.* Boatner, 20 U.S.C.M.A. 376, 43 C.M.R. 216 (1971); United States *v.* Eller, 20 U.S.C.M.A. 401, 43 C.M.R. 241 (1971).
[60] 19 U.S.C.M.A. 370, 41 C.M.R. 370 (1970).
[61] 19 U.S.C.M.A. 580, 42 C.M.R. 182 (1970).
[62] 20 U.S.C.M.A. 42, 42 C.M.R. 244 (1970).

the judge advocate who had previously served as the article 32 investigation officer. The Court found this action improper under article 6(c), UCMJ. However, considering the fact that the clemency report was favorable to the defendant and that the defendant knew of the conflict and had no objection to the report, the error was found not prejudicial. Judge Ferguson dissented, observing that the disqualification was an absolute one not to be evaluated in terms of prejudice or waiver.

In *United States* v. *Lopes*,[63] the staff judge advocate erroneously reported that the accused had been convicted of an offense of which he had been found not guilty. A new review was required where the convening authority followed the SJA's recommendation and approved the findings and sentence.

Finally, *United States* v. *Scott* [64] concerned another aspect of the post trial review. Here the staff judge advocate made reference to two post trial AWOL's of accused and the use of a knife in resisting apprehension for the second absence. Although this new matter was not submitted to accused for a written rebuttal, the Court affirmed the conviction since the accused did have an opportunity to rebut when the staff judge advocate personally interviewed accused and asked him to explain the incidents.

F. *APPELLATE REVIEW*

The most significant case in this area was *United States* v. *Chilcote* [65] which held that article 66, UCMJ, does not authorize a rehearing before a Court of Military Review en banc following a panel decision. *Maze* v. *Court of Military Review* [66] applied *Chilcote* retroactively. The Court also stated in *United States* v. *Gwaltney* that it is bound by findings of fact by a Court of Military Review.[67] Finally, in *United States* v. *Ray*,[68] the Court held that the Court of Military Review has the power to order a post trial hearing on the issue of speedy trial.

G. *MISCELLANEOUS*

The accused in *United States* v. *Cook* [69] was brought to trial and attempted to plead guilty. However, the law officer rejected the plea and ordered a continuance so that accused might undergo

[63] 20 U.S.C.M.A. 495, 43 C.M.R. 335 (1971).
[64] 20 U.S.C.M.A. 264, 43 C.M.R. 104 (1971).
[65] 20 U.S.C.M.A. 283, 43 C.M.R. 123 (1971).
[66] 20 U.S.C.M.A. 599, 44 C.M.R. 29 (1971).
[67] 20 U.S.C.M.A. 488, 43 C.M.R. 328 (1971).
[68] 20 U.S.C.M.A. 331, 43 C.M.R. 171 (1971).
[69] 20 U.S.C.M.A. 504, 43 C.M.R. 344 (1971).

psychiatric examination. When the court reconvened, accused was AWOL, and trial proceeded without him. The Court held that in light of the question of accused's mental responsibility, the law officer failed to make a proper explanation of the issue of the voluntariness of accused's absence.

United States v. *Greene*[70] was reversed due to the use of improper standards in the selection of a panel consisting of only lieutenant colonels and colonels. Where the court members knew accused had been involved in an incident of the same kind as led to the charges, that other disciplinary action had been taken against him, and one-third of the officers of the command were excluded from consideration for detail as court members in the case because of bias, the Court held that the possibility of an adverse influence on the members was such as to require reversal.[71] Finally, questions by court members and instructions by the military judge which might have left court members with the impression that the accused could be required to speak and his silence could be used against him required reversal.[72]

IV. MILITARY CRIMINAL LAW

A. *SUBSTANTIVE OFFENSES*

1. AWOL—Missing Movement—Failure to go to Formation.

Where an article 86 AWOL offense results in defendant's missing the sailing of his ship, charges should be brought under article 87 for missing movement. The missing movement was improperly added to an AWOL specification. Despite this failure the Court in *United States* v. *Venerable*[73] found no prejudice where defendant pleaded guilty to article 86 offenses and there was no suggestion the defendant was misled.

United States v. *Wilson*[74] required the Court to examine MCM, 154*b*'s caveat against accepting "a stipulation which practically amounts to a confession" in a contested case. Wilson had pleaded not guilty to an article 85 desertion charge but guilty to article 86, AWOL. A stipulation clearly admitted the AWOL. The Court rejected defense counsel's view that it also amounted to a confession to desertion. The Court noted the stipulation was unclear as to the circumstances of termination of the offense and

[70] 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970).
[71] United States *v.* Freeman, 19 U.S.C.M.A. 572, 42 C.M.R. 174 (1970).
[72] United States *v.* Burgess, 21 U.S.C.M.A. 13, 44 C.M.R. 67 (1971).
[73] 19 U.S.C.M.A. 174, 41 C.M.R. 174 (1970); *see also* United States *v.* Bobadilla, 19 U.S.C.M.A. 178, 41 C.M.R. 178 (1970).
[74] 20 U.S.C.M.A. 71, 42 C.M.R. 263 (1970).

defendant's intent. This was insufficient to "practically amount" to a confession to desertion.

In *United States* v. *McCown*,[75] the accused admitted his failure to go to a formation, but asserted as a defense the fact that his watch had stopped. The Court stated that it was reasonable to conclude that the failure did not result from a reasonable belief that he had plenty of time to make formation and would not reverse.

2. Disloyal Statement and Conduct.

In several significant cases the Court attempted to draw the lines between permissible free speech and criminally disloyal statements. The accused in *United States* v. *Daniels*[76] was convicted of eight specifications, laid under article 134, alleging that, with the intent to interfere with the loyalty, morale, and discipline of named members of the Marine Corps, he urged and attempted to cause insubordination, disloyalty, and refusal of duty on the part of said members contrary to 18 U.S.C. § 2387.

Looking to the statute, the Court determined that it requires proof not only of the prohibited acts but also two other "elements." The "subjective" element requires proof that at the time of the commission of a prohibited act the defendant possessed the specific intent prescribed by the statute. The other, "objective," element requires a showing of "a clear and present danger that the activities in question will bring about the substantive evils."

Looking first to intent, the Court determined from surrounding circumstances as well as from the language in which the declarations were framed that Daniel's declarations propounded a racial doctrine that contemplated not merely separation and lack of cooperation between the races, but violent confrontation. The Court concluded that his declarations were intended to interfere with or impair the loyalty, morale and discipline of the other marines. The Court next looked to the clear and present danger and found that such a danger did exist. Thus, the evidence satisfied both "elements" of the statute.

However, the instructions given by the military judge were deficient in that they did not advise that the court members "must find beyond a reasonable doubt that the language and the circumstances of the accused's declarations presented a clear and present danger." As a result of this error the Court only

[75] 20 U.S.C.M.A. 409, 43 C.M.R. 249 (1971).

[76] 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). *See also* United States *v.* Gray, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970).

affirmed findings of soliciting a member of the Marine Corps to commit a military offense, a lesser offense.

The companion case of *United States* v. *Harvey*[17] dealt with a conviction under article 134 for making disloyal statements. The disloyal statement offense requires a showing of disloyalty to the United States in regard to two elements. First, the accused's state of mind must have been directed toward promoting among the troops disloyalty to the United States. Second, the statements themselves must have been disloyal to the United States. However, in the definition of disloyalty given to the court members, the military judge failed to instruct that the disloyalty must be to the United States and not any other person or institution and that disobedience of orders is not per se equivalent to disloyalty to the United States. Accordingly, only a conviction for soliciting a member of the Marine Corps to commit a military offense, *i.e.*, refuse to obey orders, was affirmed.

One year later, the ruling in *Harvey* was held inapplicable to the anti-war defendant in *United States* v. *Priest*.[18] Instructing on disloyalty, the military judge spoke of unfaithfulness to "an authority to whom respect, obedience, or allegiance is due." Defense counsel's instruction stressing that the disloyalty must be to the United States and not a person or institution was rejected. However, the judge did instruct that the court members must find that each of Priest's publications "taken in its entirety" was disloyal to the United States.

On appeal, the Court affirmed the conviction, rejecting the claimed instructional error. The Court looked to the totality of the instructions and the fact that Priest had been found not guilty of one specification involving only anti-military statements in supporting their conclusion that no reasonable risk of instructional misrepresentation was present. Judge Ferguson failed to perceive a significant distinction between *Priest* and *Harvey* and dissented.

Dealing with another aspect of disloyalty, in *United States* v. *Attardi*,[19] the accused was found guilty of willfully delivering a document relating to the national defense, an offense charged under article 134. The following instructions as to what the court members must find were proper: (1) accused lawfully had access to a certain document; (2) the document related to the national defense; (3) the accused had reason to believe the document

[17] 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).
[18] 21 U.S.C.M.A. 64, 44 C.M.R. 118 (1971).
[19] 20 U.S.C.M.A. 548, 43 C.M.R. 388 (1971).

could be used to the injury of the United States or to the advantage of any foreign nation; (4) the accused willfully, at the date and place specified, delivered a copy of the document to a named person; (5) the named person was not entitled to receive a copy; (6) under the circumstances the conduct of the accused was to the prejudice of good order and discipline.

3. Article 133 Offense.

The Court found an Army second lieutenant guilty of bad judgment but not a violation of article 133 in *United States* v. *Hale*.[80] Defendant had been granted leave to go home and await his port call for shipment to Vietnam. One year later he reported, saying that he had never received the port call. The Court rejected the government contention that the lieutenant should have taken action on his own initiative. Noting that the essence of the conduct charged was AWOL, they observed that Hale's absence was always authorized and he was never out of military control. The conviction was reversed.

In *United States* v. *Pitasi*,[81] the accused was found guilty of fraternization with enlisted men. The Court upheld the conviction but suggested guidelines for conduct for both the courts and individuals in this area. In *United States* v. *Lovejoy*,[82] fraternization was found not to be separately punishable when the accused was also convicted of sodomy arising from the same acts.

4. Violation of a General Order or Regulation.

Several cases dealt with the issue of whether specific regulations were punitive in nature. *United States* v. *Benway* [83] held that MACV Directive 37–6, limiting the purchase of dollar instruments was punitive in nature. The same was true for MACV Directive 65–5 regulating the sale of postal money orders.[84] However, an I Corps Coordinator Instruction requiring implementation could not operate as a general order or regulation under article 92.[85]

Finally, in *United States* v. *Tee*,[86] the Court interpreted a regulation prohibiting possession of instruments used to administer narcotics. It was found that the listing of instruments was illustrative and not exclusive, so possession of a syringe alone was within the prohibition of the regulation where the

[80] 20 U.S.C.M.A. 150, 43 C.M.R. 342 (1970).
[81] 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971).
[82] 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970).
[83] 19 U.S.C.M.A. 345, 41 C.M.R. 345 (1970).
[84] United States *v.* McEnany, 19 U.S.C.M.A. 556, 42 C.M.R. 158 (1970).
[85] United States *v.* Woodrum, 20 U.S.C.M.A. 529, 43 C.M.R. 369 (1971).
[86] 20 U.S.C.M.A. 406, 43 C.M.R. 246 (1971).

the syringe was a type which could be used to administer narcotics if a needle was affixed.

5. Larceny, Wrongful Appropriation.

The defendant in *United States* v. *Papenheim* [87] was charged under article 134 with six specifications each alleging the wrongful taking of an item of mail. Two letters were found next to defendant's bed; the other four items were found near where defendant had reportedly been sitting in the mail room. The conviction involving the latter four offenses was overturned for failure to show the necessary dominion and control on the part of the defendant.

Minor factual matters helped determine whether the defendant in *United States* v. *Ventegeat* [88] had committed one or seventeen larcenies. As the company finance agent, Ventegeat had withheld $20.00 from seventeen men's pay. While finding it indisputable that "the evidence demonstrates a single scheme to defraud," the Court found it equally clear that defendant's success depended on factors personal to the seventeen payees. Primarily the Court noted that no theft took place until each man had signed for the deficient amount. Accordingly, seventeen larcenies had been committed. A second $20.00 schemer fared somewhat better in *United States* v. *Clark*.[89] Sergeant Clark promised promotion to certain of his troops on the payment of $20.00. He was convicted of both larceny by false pretenses (article 121) and bribery (article 134). The Court accepted his argument that the offenses were mutually exclusive. Defendant either intended to secure the promotions or he did not, stated the Court. If he did, he was guilty of taking a bribe. If he did not, he was guilty of larceny by false pretenses.

A specification describing property stolen as "goods, of a value of about $1,678, the property of the European Exchange System" was sufficient where the military judge ascertained from the defense counsel that he was aware of the specific nature of the property involved and was in no way misled by the general description. The particular articles were described in the record, thus precluding the possibility of double jeopardy.[90] However, a specification alleging that the accused did wrongfully appropriate "personal property" belonging to the Marine Corps was not sufficient to state an offense.[91]

[87] 19 U.S.C.M.A. 203, 41 C.M.R. 203 (1970).
[88] 20 U.S.C.M.A. 32, 42 C.M.R. 224 (1970).
[89] 20 U.S.C.M.A. 140, 42 C.M.R. 332 (1970).
[90] United States v. Krebs, 20 U.S.C.M.A. 487, 43 C.M.R. 327 (1971).
[91] United States v. Curtiss, 19 U.S.C.M.A. 402, 42 C.M.R. 4 (1970).

In *United States* v. *Prott*,[92] the record was devoid of information connecting accused with a stolen truck. The official record showed the truck was returned and the dispatcher, who made the log and could testify that it showed the truck returned, did not testify.

Finally, *United States* v. *Burney and Aiken*[93] involved wrongful appropriation of a truck which was used to effect the larceny of field gear. The Court found the two offenses were not multiplicious for sentencing.

6. Robbery.

In *United States* v. *Frierson*,[94] the accused was identified by the victim and other witnesses as a member of a group which attacked the victim and as one who struck the victim. Despite accused's claim of being a "bystander" the Court held that accused's knowledge of the group's intent to steal could be inferred from the actions of the group and hence affirmed the conviction.

7. Conspiracy.

There were two cases in this area. One resulted in reversal of the accused's conviction as the result of the acquittal of the accused's co-conspirators where it compellingly appeared that there was only one conspiracy.[95] The other, *United States* v. *Mahoney*,[96] was reversed for insufficiency of the evidence. The alleged co-conspirator was merely an interested bystander. There was no evidence showing he participated in the transfer of marihuana and he took no part in the negotiations and did not handle the money or the goods. Mere presence at the scene was not sufficient to establish participation in the crime.

8. Disobedience of Orders.

An accused pleaded guilty to failure to obey a transfer order. The accused did not report for his flight, but on the day of the flight, which was before he was due at his new station, reported to another installation and expressed his desire for separation as a conscientious objector. He was ordered to report to that same installation for work the next morning, which he did. This subsequent conflicting order superseded the earlier one to report for transfer. The Court held the plea was improvident.[97]

In *United States* v. *Woodley*,[98] the accused was given an order

[92] 20 U.S.C.M.A. 350, 43 C.M.R. 190 (1971).
[93] 21 U.S.C.M.A. 71/125, 44 C.M.R. 71/125 (1971).
[94] 20 U.S.C.M.A. 452, 43 C.M.R. 292 (1971).
[95] United States v. Smith, 20 U.S.C.M.A. 589, 44 C.M.R. 19 (1971).
[96] 19 U.S.C.M.A. 495, 42 C.M.R. 97 (1970).
[97] United States v. Clausen, 20 U.S.C.M.A. 288, 43 C.M.R. 128 (1971).
[98] 20 U.S.C.M.A. 357, 43 C.M.R. 197 (1971).

to perform some work. Following an initial refusal to obey, accused testified that he was "starting back" in compliance. A showing of delayed compliance was held defense to the disobedience charge and rendered the plea of guilty improvident.

9. Arson.

United States v. *Greene*[99] held that arson requires specific intent. The Court further held it was error not to instruct on intoxication when raised as a defense.

10. Wrongful Cohabitation.

Defendant in *United States* v. *Acosta*[100] was charged with wrongful cohabitation, filing a false housing application, and fraudulently obtaining a dislocation allowance. In reversing his conviction, the Court initially noted the term "cohabit" by itself does not import criminality into the specification. The Court further stated that a good faith belief on defendant's part that he had been divorced from his prior spouse and legally married to the woman involved in the present case would be a defense and that it was error to fail to properly instruct the court on this matter.

11. Sabotage.

The Court labored successfully to acquit a frustrated mechanic of a Federal Sabotage Act violation under article 134 in *United States* v. *Stewart*.[101] Stewart had thrown a pipe and chain into the air intake duct of a jet airplane. He had immediately spoken of his deed to a bystander and asked if the division officer had seen him. The pipe and chain were quickly removed without damage to person or property. The Court observed that an essential element for a Federal Sabotage Act conviction was an intent to injure the national defense. No direct evidence showed the requisite intent. Stewart's only intent, the Court concluded, was to avoid an undesirable overseas tour.

12. Threats.

United States v. *Williams*[102] held that deposit of the threat in the United States mails was an essential element of the offense of sending an obscene or threatening letter to the President.

United States v. *Shropshire*[103] held that when a threat is made which contains a contingency which cannot occur, the contin-

[99] 20 U.S.C.M.A. 297, 43 C.M.R. 137 (1971).
[100] 19 U.S.C.M.A. 341, 41 C.M.R. 341 (1970).
[101] 19 U.S.C.M.A. 417, 42 C.M.R. 19 (1970).
[102] 19 U.S.C.M.A. 334, 41 C.M.R. 334 (1970).
[103] 20 U.S.C.M.A. 374, 43 C.M.R. 214 (1971).

gency negates the threat. The test is whether there is a reasonable possibility the uncertain event could occur.

13. Mutiny.

United States v. *Brown* [104] again emphasized the limited nature of the article 94 mutiny offense. Prisoner Brown had seized a guard and threatened him with bodily harm if he did not get to see the commanding general. The Court found these facts fell short of showing an intent to usurp or override lawful military authority.

14. Homicide and Assault.

The Court firmly rejected the introduction of the familiar tort law principle of res ipsa loquitur into a criminal matter. Evidence established that defendant had picked up the victim in a tavern. Shortly thereafter his car had gone off the fog-covered road and hit a wall. The Court observed that there was no evidence of speed, drunken driving or even the fact that defendant was the driver at the time of the accident. This evidence was insufficient for a negligent homicide conviction.[105]

United States v. *Caplinger* [106] dealt with involuntary manslaughter. The Court stated that there was a basis for a finding of guilty where the testimony tended to show the following facts: (1) the accident was on the victim's side of the road; (2) defendant was under alcoholic influence; (3) he drove the truck with bad brakes and tires on a winding road during bad weather; (4) he drove into the wrong lane at least once before the accident; (5) he may have been driving too fast considering the weather, road and brakes.

The accused in *United States* v. *Leonard* [107] was convicted of assault with intent to commit murder. The Court held the evidence to be sufficient where it showed that the accused grabbed a pistol in the hands of an officer and turned it toward the officer's chest, depressing the officer's finger on the trigger. Thus, the accused controlled the weapon and had the means to kill. Sufficient basis for inferring the requisite intent could be found in the nature of the assault and the use of the deadly weapon, albeit with the safety on.

A specification alleging that the accused "did . . . strike . . . in the face with his fists" and did not aver that the act was

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[104] 19 U.S.C.M.A. 591, 42 C.M.R. 193 (1970).
[105] 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1970).
[106] 20 U.S.C.M.A. 306, 43 C.M.R. 146 (1971).
[107] 19 U.S.C.M.A. 353, 41 C.M.R. 353 (1970).

wrongful or unlawful was not sufficient to allege a violation of article 128.[108]

Finally, a specification that the accused assaulted armed forces policemen, but did not give the means used or name the victims was nevertheless sufficient where the article 32 investigation report contained the missing information and accused did not move for a bill of particulars.[109]

15. Sale of Marihuana.

In *United States* v. *Fruscella,*[110] accused was convicted in part for the unlawful sale of marihuana. The record of trial showed that the alleged purchaser testified that accused obtained marihuana for him at the purchaser's request. Thus the accused was an agent rather than a seller. As such the conviction for sale of marihuana could not stand. Since there is no lesser included offense to the charge of sale of marihuana, the specification was set aside and ordered dismissed.

B. *DEFENSES*

1. Speedy Trial.

With increased caseloads and the shortage of military lawyers, speedy trial continues to be a problem in courts-martial. In *United States* v. *Pierce,*[111] defendant's AWOL trial did not take place until 13 months after his apprehension. However, during that time defendant had been awaiting the results of a civilian court prosecution for fraudulent use of a credit card. In refusing to find a violation of the speedy trial right, the Court noted that the defendant had used his military status as a valuable bargaining tool in securing probation from the civilian court. The Court concluded that defendant's failure to raise a speedy trial motion at his court-martial reflected this matter of trial strategy.

The Court elaborated on the burden of proof requirements in *United States* v. *Turnipseed.*[112] The defendant's speedy trial contention was based primarily on a failure to give him notice of charges while he was in confinement. At trial the law officer questioned defendant and he admitted to being aware of the reasons for confinement. Accordingly, the speedy trial challenge was rejected. On appeal the Court held that defendant's article 31 rights had been violated and reversed the decision of the Court of Military Review. The Court noted that the defendant

[108] United States *v.* Jones, 20 U.S.C.M.A. 90, 42 C.M.R. 282 (1970).
[109] United States *v.* Suggs, 20 U.S.C.M.A. 196, 43 C.M.R. 36 (1970).
[110] 21 U.S.C.M.A. 26, 44 C.M.R. 80 (1971).
[111] 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970).
[112] 20 U.S.C.M.A. 137, 42 C.M.R. 329 (1970).

was under no obligation to aid the government in obtaining a conviction despite his failure to object to the questioning. Judge Quinn in dissent argued that defendant had opened the door to questioning when his counsel stated he had not been informed of the charges.

Several cases explored the developing area of speedy proceedings after findings. Defendant in *United States* v. *Ervin* [113] contended he was denied due process of law by the inordinate delay in the review of his case. Defendant's conviction had been affirmed by a Navy board of review on 14 August 1967. Due to an apparent clerical error, Ervin did not receive a copy of the disposition of the action until 13 May 1970. While reversing the conviction and dismissing the charges on other grounds the Court noted: "When the Government has control of the procedures required to effect timely disposition of criminal charges, neither its good faith nor 'inadvertent' negligence can excuse inordinate delay." In a separate concurrence, Judge Ferguson argued that the delay rose to the status of a violation of due process of law.

In *United States* v. *Blackwell,*[114] it was held that the speedy trial protections of articles 10 and 33 do not apply to the period between reversal of conviction and retrial. However, an accused is entitled to credit for that period of confinement as an alternative protection.

United States v. *Davis* [115] dealt with delayed appellate action involving 205 days between findings and receipt of the case by the Navy Court of Military Review. The Court stated that inordinate delays during appellate review do not ipso facto demonstrate prejudice as they do prior to trial. In this case, there were no errors that might have been redressed with prompt review, so the Court found no prejudice. Judge Ferguson dissented, and would have found prejudice on the delay alone. The same result was reached in *United States* v. *Prater,*[116] which involved a delayed convening authority action.

United States v. *Marin* [117] presented a more traditional speedy

[113] 20 U.S.C.M.A. 97, 42 C.M.R. 289 (1970).
[114] 19 U.S.C.M.A. 196, 41 C.M.R. 196 (1970).
[115] 20 U.S.C.M.A. 541, 43 C.M.R. 381 (1971).
[116] 20 U.S.C.M.A. 339, 43 C.M.R. 179 (1971). However, where there has been error and delay in serving the decision of the Court of Military Review that has resulted in the accused having served a substantial portion of his sentence, the Court will dismiss the charges as the only available remedy. United States *v.* Sanders, 20 U.S.C.M.A. 580, 44 C.M.R. 10 (1971); United States *v.* Adame, 20 U.S.C.M.A. 573, 44 C.M.R. 3 (1971).
[117] 20 U.S.C.M.A. 432, 44 C.M.R. 3 (1971).

trial issue. Here a 57-day delay in returning accused to the place of trial after apprehension and a 21-day delay between forwarding of charges and their receipt by the staff judge advocate were unexplained. However, the Court found no deprivation of speedy trial where the remainder of the 147-day delay between apprehension and trial was accounted for; accused was advised of the offense of which he was suspected immediately after apprehension; counsel was furnished one month before trial and did not urge acceleration; accused was not hindered in preparation for trial by the delay; and the military judge considered the delay in sentencing. *United States* v. *Ray* [118] also raised a speedy trial issue with delays totaling 94 days between preferring of charges and trial, but the delays were explained and the Court would not reverse the decision of the Court of Military Review.

2. Insanity.

The Court considered several insanity issues during the period under consideration. In *United States* v. *Morris*,[119] accused's only defense to charges of robbery and assault with a dangerous weapon was the testimony of a psychiatrist that he had acted on impulse and could not adhere to the right. The prosecution presented no testimony showing the sanity of accused. The Court held that there was no basis for an inference of mental responsibility, in view of the fact that the government permitted reliable expert testimony to stand "unrebutted and unimpeached." Under these circumstances the Court was not entitled arbitrarily to find the accused sane.

In *United States* v. *Walker*,[120] accused, convicted of premeditated murder, contended that the evidence was not sufficient to support a finding that he was legally sane at the time of the offense. The Court of Military Review was unconvinced of accused's mental ability to premeditate and reduced the conviction to unpremeditated murder. The Court remanded the case for further inquiry into accused's sanity, stating that the facts which led to the lower court's finding argued for further inquiry into the matter. In *United States* v. *Chappell*,[121] the Court held that evidence of diminished mental capacity is not a defense to unpremeditated murder, when such evidence fails to establish that the accused did not know right from wrong or was incapable of adhering to the right.

[118] 20 U.S.C.M.A. 331, 43 C.M.R. 171 (1971).
[119] 20 U.S.C.M.A. 446, 43 C.M.R. 286 (1971).
[120] 20 U.S.C.M.A. 241, 43 C.M.R. 81 (1971).
[121] 19 U.S.C.M.A. 236, 41 C.M.R. 236 (1970).

Joan of Arc had nothing on the defendant in *United States* v. *Thomas*.[122] Defending a premeditated murder and aggravated assault charge, he testified that voices had told him to throw grenades into a fellow soldier's tent. He testified that these voices had long controlled his actions in a variety of ways. Two psychiatrists gave qualified endorsement to his story. The Court held that defendant's testimony by itself provided the "some evidence which could reasonably tend to show insanity" required by MCM, 122*a*. Accordingly, failure to instruct was reversible error.

The Court's most significant exploration of the difficult insanity issue came in *United States* v. *Hernandez*.[123] Charged with assault with intent to commit rape, defendant claimed alcoholic amnesia left him with no recollection of the crime. A psychiatrist testified that Hernandez had a mental derangement, normally under complete control, but activated by his intoxication. However, the psychiatrist did not place the condition within the Manual definition of "mental defects, disease, or derangement." The trial judge provided standard insanity instructions and further instructed that voluntary intoxication, not amounting to legal insanity, did not provide a defense.

On appeal, defendant contended that instructional error had prejudiced his case. Despite the fact that his mental condition, absent alcohol, did not constitute legal insanity, he argued that the condition plus intoxication did provide a defense. A majority of the Court disagreed. They stated: "so long as the ingestion of alcohol is voluntary it is not apparent that . . . responsibility should be greater than that of a person with a mental condition—not amounting to a defect—that relaxes behavior controls when the person consumes intoxicants. . . . If a mental condition and voluntary intoxication do not independently exculpate, the sum of the two does not." Judge Ferguson dissented. He viewed defendant as suffering from a long standing mental derangement, which, together with the effects of alcohol, left him unable to adhere to the right at the time of the crime.

3. Abandonment of Rank

The accused in *United States* v. *Struckman*[124] was called in to confer with his commanding officer as a result of his rejection of non-judicial punishment. The commander charged Struckman with cowardice. When Struckman responded he would "like to

[122] 20 U.S.C.M.A. 249, 43 C.M.R. 89 (1971).
[123] 20 U.S.C.M.A. 219, 43 C.M.R. 59 (1970).
[124] 20 U.S.C.M.A. 493, 43 C.M.R. 333 (1971).

see the Marine Corps flat on its back," the commander challenged Struckman to "put me on my back." Accused tried, and was court-martialed for, among other offenses, disrespect to a superior. The Court held that the commander had abandoned his position and rank and reversed the Article 90 conviction.

4. Conscientious Objection

In 1969 in *United States* v. *Noyd*,[125] the Court recognized that the wrongful denial of an administrative request for discharge as a conscientious objector could serve as a defense to a subsequent court-martial for disobedience of a "combat related" order. Two 1971 cases involving conscientious objectors cast more darkness than light on the *Noyd* holding. Defendant in *United States* v. *Stewart* [126] pleaded guilty to disobedience after the law officer refused to hear evidence on the wrongful denial of Stewart's CO application. The Court sustained Stewart's conviction. Judge Darden repudiated *Noyd*, contending that the administrative denial, even if incorrect, could provide no defense at a court-martial. Judge Quinn reaffirmed the holding of *Noyd* but held that Stewart's guilty plea and his testimony at sentencing showed that no abuse of administrative discretion had occurred in the denial of the CO application. Judge Ferguson dissented, claiming that the law officer prejudiced Stewart by refusing to examine his claim of administrative error.

In *United States* v. *Larson*,[127] Judges Darden and Quinn again joined to uphold a conviction for disobedience of orders involving an erstwhile CO applicant. Similarly, Judges Quinn and Ferguson reiterated the *Noyd* position that, *in the proper case*, wrongful denial of a CO application could provide a defense. On appeal Larson claimed that the Army had failed to follow its regulations for processing his claim. Specifically he asserted that a required hearing before a chaplain took place before, rather than after, his application had been submitted. Judge Quinn observed that Larson had suffered no prejudice from the transposition and refused to invalidate the conviction for such a technical error. Judge Ferguson, looking beyond the issue raised by appellate counsel, found that the chaplain had used an improper standard in assessing Larson's religious beliefs. In the face of clear prejudice, he argued that reversal was required.

5. Former Jeopardy

Confusion at trial concerning defendant's family situation lead

[125] 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).
[126] 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971).
[127] 20 U.S.C.M.A. 565, 43 C.M.R. 405 (1971).

to Court interpretation of the former jeopardy provisions of the Code and the Constitution in *United States* v. *Richardson*.[128] Richardson took the stand in his desertion trial to explain his responsibilities to his wife and children. After a finding of guilty, his military records were admitted at sentencing. They showed that Richardson had no wife or children. Defense counsel admitted that he had not fully explored the inconsistency with his client. However, after a short recess, trial and defense counsel stipulated Richardson's story was substantially correct. Apparently unimpressed, the military judge withdrew the finding of guilty and declared a mistrial. He claimed that the evidence of perjury would influence him at sentence and that Richardson had not received competent representation of counsel. At Richardson's second trial for desertion he raised the defense of former jeopardy.

The Court of Military Appeals affirmed the trial court ruling that no former jeopardy issue was present. Judge Darden ruled that UCMJ 44(b) governs only final proceedings, not those terminated before sentence like Richardson's. Further, Supreme Court 5th Amendment cases were distinguishable as involving cases terminated prior to a finding of guilt. Here there was no contention that defendant might have been found not guilty save for the mistrial. Judge Quinn disagreed with Judge Darden's interpretation of the scope of Article 44, but concurred that a retrial was proper. Judge Ferguson dissented, viewing the judge's action in declaring a mistrial improper. Because of the improper action, Richardson was entitled to assert the former jeopardy defense.

V. EVIDENCE

A. *ADMISSION OF PREVIOUS CONVICTIONS AND NONJUDICIAL PUNISHMENT*

The Court wrestled with several issues involving the admissibility of past acts of misconduct. The litigation stemmed from the changes in the new Manual for Courts-Martial governing the admission of evidence of past convictions and nonjudicial punishment. In *United States* v. *Griffin*,[129] evidence of two prior unauthorized absences were admitted at sentencing. The absences were inadmissible under the three-year limitation of the 1951 Manual for Courts-Martial, para 75*b*(2). The offenses were, however, ad-

[128] 21 U.S.C.M.A. 54, 44 C.M.R. 108 (1971).
[129] 19 U.S.C.M.A. 348, 41 C.M.R. 348 (1970).

missible under the six-year provision of the current Manual, para 75*b*(2). The executive order promulgating the new Manual provided that "maximum punishment for an offense committed prior [to January 1, 1969] shall not exceed the applicable limit in effect at the time of the commission of such offense." The government contended that the admissibility of prior convictions was not a matter going to the "applicable limit" of punishment. The defendant argued that any factor which disadvantaged the defendant violated the prohibition against ex post facto legislation.

The Court of Military Appeals noted that "the matter does not lend itself to resolution in terms of strict logic or precedent." However, the practical effect was to prejudice the defendant and in fact affect the applicable limit of "punishment." Accordingly, the Court concluded "that the punishment proviso of the executive order forbade utilization of the six-year provision contained in the 1969 Manual."

A related problem arose in *United States* v. *Worley*.[130] Defendant pleaded guilty to marihuana offenses under Article 134. At sentencing evidence of uncharged misconduct was admitted. The defendant contended a specific limiting instruction was required. The government contended that the change in MCM, 76*a*(2), allowed the court at sentence to "consider evidence of other offenses or acts of misconduct which were properly introduced in the case, even if that evidence does not meet the requirements of admissibility in 75*b*(2) and even if it was introduced for a limited purpose before the findings." The Court found this a valid exercise of the President's rule-making powers and rejected a contention that the provision was "unreasonable and illogical." The Court next rejected the contention that *Griffin* precluded the use of the new Manual provision. The Court noted that both the charged offenses and the other acts of misconduct occurred after the effective date of the new Manual. Accordingly, Worley "was charged with notice of the new provisions."

Probably the most vexing question regarding the application and validity of new Manual provisions was considered in *United States* v. *Johnson*.[131]

At issue was the new Manual's provision allowing the consideration of prior Article 15 punishments at sentencing, MCM, para 75*d*. Johnson contended that the admission of Article 15

[130] 19 U.S.C.M.A. 444, 42 C.M.R. 46 (1970).
[131] 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970).

punishments clearly violated congressional intent in enacting the UCMJ. The majority of the Court disagreed with Johnson's conclusion. While noting that an Article 15 punishment "is not a conviction" the majority saw "nothing in the legislative history of Article 15 that is inconsistent with the use of records of the nonjudicial punishment by a court-martial when it is deliberating on an appropriate sentence."

Having answered the underlying question against the accused the Court then reversed his conviction along *Griffin* and *Worley* precepts. Prior Manual practice had not allowed the admission of Article 15 punishments at sentencing. Since Johnson's charged offenses took place before the effective date of the new Manual, reversal was required.

Judge Ferguson concurred as to the result. However, he sharply contested the majority's conclusion upholding the validity of MCM, 75*d*. Citing the legislative record surrounding the enactment of Article 15 of the Code, Judge Ferguson found ample evidence that nonjudicial punishment was intended to be wholly apart from court-martial proceedings. Judge Ferguson felt that the legislative history made "crystal clear that Congress enacted the present Article 15, conferring wide disciplinary powers on commanders, with the understanding and intent that such punishments would not form a part of the man's records; would not follow him throughout his service career; and would not be treated in future courts-martial as previous convictions . . . and not produced at some later court-martial as evidence of his prior bad behavior." In Judge Ferguson's eyes, MCM, 75*d*, flatly violated this understanding.

The Court immediately established a limited exception to the Johnson, Worley, and Griffin rules. In *United States* v. *Flowers*,[132] defendant was charged with offenses involving carnal knowledge, lewd and lascivious acts, and the communication of threats to kill. He objected on *Worley* grounds to the failure to instruct regarding uncharged lascivious conduct, adultery, and communication of threats offenses. The court observed that the initial potential confinement period of 48 years had been reduced during the appellate process to 1 year. The Court found it "inconceivable" that the limiting instructions could have influenced a more favorable sentence for defendant and denied relief. In *United States* v. *Young*,[133] Article 15 punishment for a two and one-half hour unauthorized absence was admitted. The Court found

[132] 19 U.S.C.M.A. 473, 42 C.M.R. 75 (1970).
[133] 19 U.S.C.M.A. 481, 42 C.M.R. 83 (1970).

Johnson error but noted the existence of prior special court-martial convictions for absences and held that no prejudice occurred. Similarly, in *United States* v. *Gauthier*,[134] the existence of two previous convictions and a sentence less than the pretrial agreement maximum assured the Court that no prejudice had taken place. In *United States* v. *Bruns*,[135] the Court found that defendant's mitigation testimony had explained the Article 15 offense and had resulted in a suspended sentence. Accordingly, the *Johnson* error was not prejudicial. Judge Ferguson refused to accept the "no prejudice" argument and dissented in each *Johnson* error affirmance. The Court's most serious factual disagreement over a *Johnson* issue occurred in *United States* v. *Baker*.[136] Defendant was convicted of wrongfully giving money with intent to influence official acts, communicating threats, assaulting a noncommissioned officer, attempted theft, and wrongful appropriation. The improperly admitted Article 15 punishment was for failure to obey a lawful order and being disorderly in the barracks. The seriousness of the charged offenses and the insignificance of the Article 15 offenses convinced the majority that no prejudice occurred. Judge Ferguson found this conclusion "wholly unwarranted." He observed that the impermissible evidence was the entirety of prosecution's evidence at sentence. Under these circumstances a fair risk of prejudice to the defendant was present.

A final case involving a lack of prejudice for a failure to instruct on misconduct not charged was *United States* v. *Gaitanis*.[137] The uncharged past misconduct was marihuana use. In affirming the sentence, the Court noted that defendant was acquitted as to charged marihuana offenses and was given a very light sentence for the offenses of which he was convicted.

The Court's most recent consideration of the admissibility of Article 15 punishments at sentencing occurred in *United States* v. *Cohan*.[138] At issue was an Army regulation regarding the removal of Article 15 punishments from a soldier's personnel records. Among other grounds the regulation orders Article 15 records to be destroyed "upon transfer of the individual from the organization . . . provided that at the time of transfer, a period of 1 year has elapsed since imposition of the punishment and that all punishment imposed has been executed (with for-

[134] 19 U.S.C.M.A. 482, 42 C.M.R. 84 (1970).
[135] 19 U.S.C.M.A. 501, 42 C.M.R. 103 (1970).
[136] 20 U.S.C.M.A. 175, 43 C.M.R. 95 (1970).
[137] 20 U.S.C.M.A. 11, 42 C.M.R. 203 (1970).
[138] 20 U.S.C.M.A. 469, 43 C.M.R. 309 (1971).

feitures collected and any period of detention of pay expired) and action has been completed on any appeal from such punishment. If these conditions do not exist at time of transfer, the copy of the record of proceedings will be retained . . . until the foregoing conditions no longer exist." At sentencing in March 1970, Cohan challenged the admission of a 16 September 1968 nonjudicial punishment. He noted that he had transferred units in February 1969 and that by his reading of the regulation the records should have been destroyed in September 1969. The Government countered that since one year had not elapsed at the time of transfer there was a "non-existing condition" which could never satisfy the provision that "the foregoing conditions no longer exist." Relying more on regulatory intent than wording the Court adopted Cohan's view. However, the Court found no prejudice in the consideration of the Article 15 and affirmed Cohan's conviction.

B. *PRETRIAL ADMISSIONS*

The proper use of Article 31 and counsel warnings continued to challenge the Court. *United States* v. *Johnson* [139] re-emphasized Article 31's requirement that the accused be informed of the suspected offense. At the time of his arrest Johnson was suspected of desertion and also of attempts to contact the North Vietnamese to discuss peace negotiations. The Article 31 warning spoke of the desertion but did not mention the attempted negotiations. Despite the investigating officer's testimony that he did not know the Code prohibited such conduct, the Court reversed for failure to advise on this offense. The Court in essence charged the investigator with knowledge that such an action should have been illegal.

The Court's hardest decisions came in determining the consequences of improperly admitted pretrial statements. In *United States* v. *Bearchild*,[140] the Court recognized the fact that improper admission of an accused's pretrial statement could in many instances compel him to testify at trial. Accordingly, *Bearchild* required an affirmative showing that the illegal statement did not taint the subsequent testimony. One ramification of the *Bearchild* decision was resolved in *United States* v. *Hurt*.[141] At his court-martial for unpremeditated murder, Hurt unsuccessfully objected to the admission of pretrial statements that he recalled

[139] 20 U.S.C.M.A. 320, 43 C.M.R. 160 (1971).
[140] 17 U.S.C.M.A. 598, 38 C.M.R. 396 (1968).
[141] 19 U.S.C.M.A. 206, 41 C.M.R. 206 (1970).

reloading the murder weapon and shooting the victim. Allegedly "compelled" to counteract the pretrial statement, Hurt took the stand. Based on his interpretation of *Bearchild*, the law officer instructed the court that if they found the pretrial statement involuntary they must totally disregard Hurt's in-court testimony. The Court of Military Appeals joined with Hurt's defense counsel in rejecting this interpretation of *Bearchild*. That case "was never intended to be construed so as to deprive the appellant of a defense." Such a cautionary instruction "should be reserved for those instances in which testimony or declarations are offered against an accused. . . ." Hurt's conviction was reversed. Judge Quinn dissented claiming Hurt could not consistently argue that his trial testimony was truthful on the one hand and that it should not be considered because it was coerced on the other hand.

Judge Quinn was on the winning side of the *Bearchild* argument in *United States* v. *Masemer*.[142] Sergeant Masemer's pretrial statement was arguably defective for an incomplete counsel warning. No objection was raised to the admission of the statement at trial and Masemer took the stand to testify substantially in agreement with his earlier statement. Under the circumstances the majority found the defense had consented to the receipt of the pretrial statement since both utterances tended to rebut the Government's case and establish a defense for Masemer. Judge Ferguson, dissenting, argued the majority was placing the burden on the wrong party. He found no evidence that the Government had shown a proper warning was given Masemer prior to taking his pretrial statement. Further, Judge Ferguson argued that *Bearchild* required an affirmative government showing that its illegal action did not induce Masemer's testimony. This government burden could not be defeated by the majority's implied waiver theory.

The *Masemer* majority reasserted itself one year later in *United States* v. *Meade*.[143] After failing to exclude a pretrial statement at the Article 39a session, defense counsel objected, at trial, to the admission of the statement. However, in an out-of-court hearing defense counsel stated it was not his intention to litigate the issue before the court members. Later the defendant testified, making only a brief reference to the circumstances surrounding the taking of his pretrial statement. Following his testimony, the judge asked whether there was a voluntariness issue for sub-

[142] 19 U.S.C.M.A. 366, 41 C.M.R. 366 (1970).
[143] 20 U.S.C.M.A. 510, 43 C.M.R. 350 (1971).

mission to the court members. Defendant's individual counsel stated that he would rely on the out-of-court hearing and not submit the issue to the court. The appointed defense counsel concurred. In final argument both defense counsel stressed self-defense and ignored any issue of voluntariness. On appeal the defendant contended a voluntariness instruction was mandatory "unless (1) the defense withdrew its objection made in open court to the admission of the confession and (2) the appellee recanted his testimony suggesting that the statement was taken from him in violation of his right to counsel." The Court rejected this theory finding it would "unreasonably restrict defense counsel in his selection of strategy." From the facts the Court found a weak voluntariness argument and a somewhat stronger self-defense claim. Sound trial strategy might have called for not highlighting the weaker issue. Clearly either an instruction or a recantation would have worked against this defense objective.

Judge Ferguson's dissent stressed the Court's limited function in reviewing a Court of Military Review finding of fact that the evidence raised an voluntariness issue. As the finding was neither arbitrary nor capricious the Court of Military Appeals should have found prejudicial error in the failure to instruct.

The *Masemer* holding similarly controlled *United States* v. *Gilliard*.[144] The holding of *United States* v. *Hurt* was again reaffirmed in *United States* v. *Carey*.[145]

The peculiar problems of self-incrimination in a compulsory psychiatric examination faced the Court in *United States* v. *White*.[146] At the exam an incomplete warning was given the defendant. At trial defendant testified he did not remember taking the murder weapon out of his waist band or pulling the trigger. The examining psychiatrist testified defendant was sane and did not suffer from a total inability to remember. Trial counsel then asked "When you did question him, if you did pursue it, did he then remember?" The psychiatrist answered, "with difficulty he did." On argument trial counsel stated "Now, the accused says he doesn't recall. The psychiatrist says it took a little prodding, sure, it bothers him and it would bother me, if I had done what he did." While affirming the principle of *United States* v. *Babbidge*[147] that the self-incrimination privilege would not block testimony of a government psychiatrist about his conclusions on the sanity issue, the Court found more was involved. The Court read the

[144] 20 U.S.C.M.A. 534, 43 C.M.R. 374 (1971).
[145] 21 U.S.C.M.A. 33, 44 C.M.R. 87 (1971).
[146] 19 U.S.C.M.A. 338, 41 C.M.R. 338 (1970).
[147] 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969).

psychiatrist's testimony as possibly indicating that defendant had made statements at the psychiatric exam contrary to those made at the trial. Absent valid warnings, the psychiatrist's testimony on this matter was inadmissible.

The United States Supreme Court's significant limitation of the *Miranda* doctrine in *Harris* v. *New York* [148] was not applied to the military. Defendant in *United States* v. *Jordan* [149] made a pretrial statement following an improper counsel warning. After Jordan took the stand in his own defense, the statement was introduced for impeachment purposes. While conceding that *Harris* had legitimized such practice in the civilian sphere, the Court observed that the Manual for Courts-Martial recognized a *Miranda*-based bar on *any* use of the improperly taken statement. Judge Quinn in dissent found sufficient Manual flexibility to incorporate the new interpretation of the meaning of *Miranda*. Accordingly, he would have admitted the statement and affirmed the conviction.

Two cases examined the relation between searches and questioning occurring as a consequence of the search. In *United States* v. *Crow*,[150] illegal drugs were found in a search of Crow's wall locker. Immediately following the search a CID agent questioned accused regarding the drugs. Inculpatory oral admissions were made by the defendant. At trial the search was invalidated. The Court had little difficulty finding that the oral admission so closely followed the illegal search that "it would seem to be the direct result of the exploitation by the Government of its illegal action and, hence, inadmissible."

A more difficult question was involved in *United States* v. *Rehm*.[151] Defendant's sergeant entered the squad bay for purposes unrelated to criminal investigation and saw defendant trying to hide something. Defendant stated "You have caught me now." Without giving an Article 31 warning, the sergeant asked defendant to pass him the envelope he had been concealing. The envelope contained marihuana. Defendant contended that an Article 31 warning was needed in this situation. The Court repeated the well-established principle that such a warning was not a prerequisite to a lawful search. However, the Court chose to characterize the situation as an interrogation rather than a search. Accordingly, it reversed the conviction for the failure to provide a proper Article 31 warning.

[148] 401 U.S. 222 (1971).
[149] 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971).
[150] 19 U.S.C.M.A. 384, 41 C.M.R. 384 (1970).
[151] 19 U.S.C.M.A. 559, 42 C.M.R. 161 (1970).

C. *CORROBORATION*

The new Manual provisions caused litigation in the corroboration area. The consequences of the changed provisions were clearly faced in *United States* v. *Hise*.[152] Hise's sodomy offense occurred before the effective date of the new Manual. His trial occurred after. At trial Hise argued that his confession had to be corroborated by "substantial independent evidence tending to establish the existence of each element of the offense charged," the standard of the 1951 Manual. The law officer instead instructed according to the 1969 Manual rule that independent evidence was needed "which corroborates the essential facts admitted sufficiently to justify an inference of their truth."

On review the Navy Court of Military Review conceded that Hise's conviction could not be sustained under the 1951 standard. However, it held use of the newer standard was proper. The Court of Military Appeals reversed. The Court found the rule of corroboration involved the sufficiency of the evidence. Established constitutional principles forbid lessening the evidence required for conviction after the occurrence of a crime. Therefore, the application of the 1969 Manual rule was ex post facto and a reversal was required.

Similarly governed by the Hise ex post facto rule was *United States* v. *Coates*.[153] Defendant was charged with larceny of 10,000 cartons of cigarettes from a United States Government pier. A pretrial confession admitted the details of the scheme. On appeal defense counsel argued there was no independent evidence as to the probable existence of each element of the offense of larceny. The Court of Military Appeals disagreed. Independent evidence showed that on the day of the confessed larceny 232 pallets of cigarettes were awaiting shipment to a receiving warehouse of the Vietnam Regional Exchange. Defendant was authorized to issue documents for the possession of such cargo. Defendant told his superior that he had authorized two trucks to pick up either cigarettes or beer in order to "deplete this commodity that was taking up so much space." Two guards verified the departure of the two trucks. A later inquiry to the Vietnam Regional Exchange warehouse disclosed that no truckloads of cigarettes had been received during the period following the trucks' departure from the pier area. The Court found this circumstantial evidence sufficient to make probable the existence of every element of the larceny offense.

[152] 20 U.S.C.M.A. 3, 42 C.M.R. 195 (1970).
[153] 20 U.S.C.M.A. 132, 42 C.M.R. 324 (1970).

Sufficient corroboration was found under the lighter standards of the 1969 Manual to support a conviction for marihuana transactions in *United States* v. *Stricklin*.[154] Defendant had confessed to bringing ten bags of marihuana aboard ship and selling them to one Burnett. For purposes of corroboration the trial counsel called various sailors who purchased marihuana from Burnett during the time immediately following Stricklin's confessed sale. Burnett's sales and his remaining stock on hand accounted for the entire ten bags. In addition the physical description of one bag matched the description given by Stricklin in his confession. The court found adequate corroboration present and affirmed Stricklin's conviction.

D. *COMPETENCE OF WITNESSES*

The over-coached witness caused problems for the Court in *United States* v. *Conway*.[155] The witness was an accomplice of the accused who testified pursuant to an agreement with the staff judge advocate. At trial the witness testified on cross-examination that he believed he was required to testify in accordance with his prior statements in order to avoid trial by general court-martial. The Court, citing *United States* v. *Stolz*,[156] found the witness to be incompetent and reversed the conviction.

E. *LINE-UPS*

A brutal barracks murder set the stage for a challenged lineup in *United States* v. *Schultz*.[157] Several witnesses saw the figure of the assumed murderer leaving the darkened barracks. After other evidence implicated Schultz, a battalion lineup was authorized. Prior to the lineup all participants were advised of their rights to counsel. Witnesses were positioned to watch each participant walk past a window. On two occasions Schultz was picked out as having the general characteristics of the murderer. At trial, Schultz contended that the results of the lineup were inadmissible because an adequate counsel warning was not given and because it was not determined whether the lineup was improperly suggestive. Both contentions were rejected by the Court. It found ample evidence that a right to counsel warning had been given and was heard by Schultz. Further, there was no evidence the lineup was suggestive. Finally, the witnesses' identification

[154] 20 U.S.C.M.A. 609, 44 C.M.R. 39 (1971).
[155] 20 U.S.C.M.A. 99, 42 C.M.R. 291 (1970).
[156] 14 U.S.C.M.A. 461, 34 C.M.R. 245 (1964).
[157] 19 U.S.C.M.A. 311, 41 C.M.R. 311 (1970).

testimony was the same as at trial, that Schultz "resembled" the murderer.

F. *FRESH COMPLAINT*

United States v. *Pitasi* [158] reaffirmed the strict limitations on the use of fresh complaint evidence to corroborate the testimony of the victim of a sex crime. Seaman Schultz, a thoroughly incredible witness, testified to his participation in acts of sodomy with Pitasi. To bolster Schultz's testimony the prosecution introduced the testimony of Seaman Merriman. Merriman stated that Schultz told him that an officer had made a pass at him. The officer was not identified nor was the precise nature of the pass detailed. Further no effort was made to report the offense to superior officers for some months. The Court of Military Appeals refused to allow such barracks gossip to be admissible as evidence of a fresh complaint. Merriman's testimony was ruled inadmissible and the conviction reversed.

G. *SEARCH AND SEIZURE*

Search and seizure cases constituted a significant portion of the Court's work. A recurring fact situation involved the situation where evidence of defendant's involvement with drugs was present but there was an insufficient showing that they would probably be found in the place to be searched. In *United States* v. *Elwood* [159] defendant was arrested by Kileen, Texas, police on suspicion of possession of marihuana. Authorities at Fort Hood were contacted and an authorized search of Elwood's locker was undertaken. The Court of Military Appeals held that the mere fact of arrest some five miles away did not provide sufficient basis to assume that additional contraband would be found among defendant's possessions. *Elwood* was cited in *United States* v. *Moore*.[160] Here defendant's commanding officer in Kansas learned that defendant was thought to be involved in smuggling marihuana across the Mexican border. The commander authorized a search. Incriminating evidence found among Moore's personal effects was held to be inadmissible. In dissent, Chief Judge Quinn argued that the large amount of marihuana involved in the smuggling venture made the Kansas search a reasonable one.

Arguably closer on its facts, but the same in result, was *United States* v. *Racz*.[161] There defendant was caught red-handed

[158] 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971).
[159] 19 U.S.C.M.A. 376, 41 C.M.R. 376 (1970).
[160] 19 U.S.C.M.A. 586, 42 C.M.R. 188 (1970).
[161] 21 U.S.C.M.A. 24, 44 C.M.R. 78 (1971).

smoking marihuana in a defense bunker in Vietnam. He was searched and a small quantity of marihuana found. The company commander thereupon authorized a search of the accused's room revealing a further quantity of marihuana. The Court invalidated the search for insufficient probable cause.

The Court also indicated the administrative inventory would not guarantee exemption from the *Elwood* and *Moore* precepts. In *United States* v. *Mossbauer* [162] a superior officer learned defendant had been arrested by civilian police for marihuana possession. Shortly thereafter he ordered defendant's gear inventoried and secured in the supply room. The lock on defendant's footlocker was cut and inside defendant's field jacket tobacco-like fragments were found. Despite the regular appearance of the tobacco, it was submitted for a CID check which revealed it to be marihuana. In reversing the conviction a majority of the Court held the inventory was merely a pretext to conduct an illegal search. Among other facts the court noted that defendant's prompt release from civilian custody was expected, that the usual procedure was to wait several hours longer before securing gear, and that a general lack of care was shown if "safeguarding" defendant's property was the real objective. Judge Quinn concurred in the reversal on the ground that no probable cause existed for turning the normal looking tobacco over for CID investigation.

Two cases involving informants also resulted in the invalidation of searches prompted by their testimony. The Court conceded the reliability of the informants but felt that their information did not supply sufficient grounds for search. In *United States* v. *Crow*,[163] an informant reported that he had smoked marihuana with Crow approximately a month before the search. The informant also stated that "if anyone might have opium it would be Crow." Since the time of the incident Crow had been transferred to a different unit and had given no evidence of involvement with drugs. The Court held that in view of the lapsed time and the absence of any evidence that Crow had drugs in the area searched probable cause for search did not exist. On the same day the Court overturned a conviction in *United States* v. *Clifford*.[164] An informant stated that he had purchased marihuana "ten or fifteen times" from Clifford and had smoked with him on numerous occasions. He identified an off-post meeting house

[162] 20 U.S.C.M.A. 584, 44 C.M.R. 14 (1971).
[163] 19 U.S.C.M.A. 384, 41 C.M.R. 384 (1970).
[164] 19 U.S.C.M.A. 391, 41 C.M.R. 391 (1970).

where some offenses had occurred. On 12 April 1968 Clifford was taken into custody outside the house and marihuana was found in his possession. The informant further stated that Clifford sometimes used a rented hotel room to keep marihuana. Later in the month of April Clifford was observed in the area of the Seaview Motel and a surveillance was begun. Presented with this evidence Clifford's commanding officer authorized a search of the motel room because of his belief "that any residence Clifford was occupying, whether a room or a house, there was a possibility there might be some warijuana [sic] there." Despite the credibility of the informant the Court found no basis for believing that Clifford possessed marihuana at the motel on the date of search.

The most intriguing case involving an informant was *United States* v. *Weshenfelder*.[165] There CID agent Trego got an anonymous call from an alleged military intelligence agent who said that a major would illegally sell ration cards in a Saigon bar. At the bar Trego saw Major Weshenfelder and a sergeant who identified himself as the informant by prearranged signals to Trego and a fellow investigator. The informant disclosed that Weshenfelder and a companion were armed and that he had received much of his information from an unidentified Vietnamese national. Trego and his fellow CID agent stopped and searched Weshenfelder and his companion shortly after they left the bar. A weapon was found on Weshenfelder and illegal ration cards were found on his companion. Notified of this information, Weshenfelder's commander authorized a search of his office desk. Further ration cards were found there.

The Court of Military Appeals found no probable cause for the arrest and ensuing search of Weshenfelder. Trego and his companion had observed no criminal activity in the bar. Further the reliability of the two informants (the sergeant and the unnamed Vietnamese national) had not been shown to Trego. Accordingly, the weapon's possession conviction was reversed. Different considerations mandated affirmance of Weshenfelder's conviction for illegal possession of ration cards. The Court held the commanding officer has an absolute right to search a desk used for government business. Such a search does not invade on the rights of personal privacy protected by the fourth amendment.

The existence or absence of good faith on the part of law enforcement officials occasionally appeared to govern the validity of a search. Blatant bad faith was evident in *United States*

[165] 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971).

v. *Santo*.[166] Defendant was AWOL and suspected by the CID of drug use. Agents went to his apartment and secured his ID card by claiming to have run into defendant's automobile. Defendant was immediately arrested for unauthorized absence. Hearing noise from inside a bedroom an agent intruded despite defendant's statements that he was entertaining a female companion. A bag containing marihuana was found on the bedroom floor. A further search revealed heroin. The Court of Military Appeals brushed aside the agent's contention that a man with a gun might have been in the bedroom. From the entire testimony the Court gained "the abiding impression that the entire proceedings were designed to apprehend the accused in the apartment ostensibly for unauthorized absence and thereby to gain a pretext for making an otherwise unauthorized search for narcotics." The searches were invalidated and the drug conviction set aside.

Conversely, apparent good faith saved a conviction for unauthorized possession of an identification card in *United States* v. *Zeigler*.[167] Chief Warrant Officer Braxton had encountered the defendant at a post service club in a disheveled and unmilitary condition. Braxton subsequently verified that the defendant had given him a phony identification story. The next day Braxton again encountered defendant and asked him to come to the guardhouse and to get his wallet to prove his identity. The wallet was taken from the defendant and a false ID card found therein. Defendant was later charged with wrongful possession of this ID card. At trial defendant contended that CWO Braxton had acted improperly in searching for and discovering the ID card and in failing to give Article 31 warnings. The majority of the Court found that Braxton had acted reasonably on his belief that defendant was a civilian not authorized to be on the base. Under these circumstances Braxton's limited questioning did not require the giving of Article 31 or counsel warnings. Similarly, the restraint of the defendant and the examination of his wallet were a "reasonable response to the situation facing" the chief warrant officer. Judge Ferguson in dissent found that an Article 31 warning was required and the admission of the identification card was improper.

An excess of candor may have invalidated the search in *United States* v. *Alston*.[168] The defendant had extorted money from two barracks mates. They reported him to the company commander

[166] 20 U.S.C.M.A. 294, 43 C.M.R. 134 (1971).
[167] 20 U.S.C.M.A. 523, 43 C.M.R. 363 (1971).
[168] 20 U.S.C.M.A. 581, 44 C.M.R. 11 (1971).

who ordered a search of defendant's locker before putting the defendant under arrest. Marihuana was found in the locker but not the stolen funds. At trial the commanding officer stated that he doubted whether the money would be in the locker. The majority of the Court agreed with him and found no probable cause for the locker search. Judge Quinn dissented. He contended that facts, not the commanding officer's belief, should be considered. From the facts he found probable cause for the locker's search.

United States v. *Welch*,[169] distinguished a good faith police inventory from a search. Welch had abandoned his motorcycle and fled after post police had unsuccessfully tried to question him concerning a traffic offense. A black bag found with the motorcycle was taken into custody by the MP's and its contents inventoried. Among the items found were a prohibited switchblade knife and marihuana. Citing *United States* v. *Kazmierczak*,[170] the Court upheld the government's designation of its activity as a lawful administrative inventory to assure the safekeeping of Welch's personal effects. The court saw no reason to believe the inventory was a search in disguise. Judge Ferguson in dissent contended that police good faith was not the test to be applied. He held that inventory was permissible only after a decision to detain a suspect. Here testimony indicated the detention decision was made after inventory.

The decision in *United States* v. *Schultz*,[171] turned on the scope of a search authorized by the commander. The offense was premeditated murder and significant evidence pointed to Schultz as the killer. The commanding officer authorized a search of Schultz's wall locker "for anything that might have blood on it, 'any type of weapon, sharp instrument, particularly a knife.' " In the locker a wet towel was found and seized. Also seized were the trousers Schultz was wearing at the time of the search and which he admitted having worn at the time the murder took place. Both items were later determined to have blood on them. The Court found that the authority for search extended only to a type of weapon. The seizure of the towel was thus beyond this limit and should have been excluded. However, reviewing all facts of the case the Court found the towel supplied no incriminating evidence against Schultz. The Court sustained the seizure of the trousers as an item in plain view and not the product of the locker search.

[169] 19 U.S.C.M.A. 134, 41 C.M.R. 134 (1970).
[170] 16 U.S.C.M.A. 594, 37 C.M.R. 214 (1967).
[171] 19 U.S.C.M.A. 311, 41 C.M.R. 311 (1970).

In *United States* v. *Bunch*,[172] the Court refused to give retroactive application to the principles of *Chimel* v. *California*.[173] Accordingly, the scope of a search incident to arrest was determined by preexisting law. In *Bunch* an informant supplied the arresting officer with the following information (1) informant was present when Bunch contracted to buy half a kilo of marihuana, (2) he saw Bunch in a car with the half kilo in his possession, (3) he heard Bunch agree to hide the marihuana in his residence. Prior to making the arrest the officer verified several significant aspects of the informant's story. Based on this information probable cause for arrest was found. Similarly upheld was the search based on an informant's tip in *United States* v. *McFarland*.[174] The evidence presented to the commander authorizing the search was: (1) the informant had placed himself under medical treatment for help in solving his drug problem, (2) he was privy to a conversation between McFarland and a Sergeant Goldstein in which Goldstein said he was negotiating to purchase a large quantity of LSD and marihuana and that he would take the contraband on leave to Hawaii with him, (3) two days later McFarland said he was going to Hawaii with Goldstein and would purchase some marihuana from him, (4) the investigating agent determined that Goldstein had arranged for passage to Hawaii the day after the second conversation. Based on this information, Goldstein and McFarland were apprehended and searched at the base terminal. The Court held proper the denial of a motion to exclude the seized marihuana. The Count found the informant was reliable based on his action in turning himself in and on the verification of certain parts of his story. Further, the information he gave was held to provide probable cause for the search.

The problem of a search pursuant to an inspection was also present in *United States* v. *Grace*.[175] In *Grace* the squadron commander had ordered an inspection of the three barracks in the squadron area "to check living conditions" and to disclose any unauthorized weapons. During the course of inspecting one barracks an unidentified party informed the inspector that resident Grace had marihuana in his locker. Shortly thereafter, while the inspection continued, the investigator notice Grace take something out of his locker. Grace was directed to return the

[172] 19 U.S.C.M.A. 309, 41 C.M.R. 309 (1970).
[173] 395 U.S. 752 (1969).
[174] 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970).
[175] 19 U.S.C.M.A. 409, 42 C.M.R. 11 (1970).

item but questioned the inspector's authority. At this point Grace was advised of his constitutional rights and placed under apprehension. After some discussion the inspection was continued and marihuana found in Grace's locker. Examining the facts the Court upheld the Court of Military Review conclusion that "completion of the inspection was not a sham intended to circumvent the requirements for a lawful search." The Court also rejected the contention that once Grace became a suspect, the inspection became a search. The Court held "An inspection valid at inception is not transformed into an illegal proceedings simply because one of the persons subject to inspection becomes the subject of a criminal investigation."

The special circumstances of *United States* v. *Maglito*[176] removed the need for probable cause for search. Maglito was being held on legal hold in a special barracks occupied by persons under various degrees of restraint. Barracks regulations forbade the possession of numerous items including civilian clothes. Maglito had entered the barracks carrying a paper bag. When questioned, he stated the bag contained civilian clothes. Its search revealed that it in fact contained marihuana. Rejecting Maglito's claim that the search should be invalidated, the Court found such a search reasonable under the circumstances. The Court found no significance in Maglito's being on legal hold status as contrasted to a more guilt-indicating type of restraint.

The long established principle that a search incident to an arrest is invalid if the arrest is invalid freed the defendant in *United States* v. *Myers*.[177] Defendant was one of a group of marines stopped by two corporals on routine patrol. Six hand-rolled cigarettes were found by a bush near the men. The law enforcement officer placed the men under apprehension and searched their clothing. A marihuana cigarette was found on the defendant. The Court found that even assuming the law enforcement officer could validly identify the six cigarettes as containing marihuana he had no evidence that the defendant exercised dominion and control over them. By merely being at the scene, the defendant could not be subject to arrest for marihuana possession. Accordingly, the ensuing search was invalidated and the conviction set aside.

H. *DEPOSITIONS AND WITNESSES*

Some of the Court's most significant decisions were in the area of depositions and the availability of witnesses. The first of

[176] 20 U.S.C.M.A. 456, 43 C.M.R. 296 (1971).
[177] 20 U.S.C.M.A. 269, 43 C.M.R. 109 (1971).

these cases was *United States* v. *Davis*.[178] Davis was tried for sodomy and assault with intent to commit sodomy in the stockade at Ft. Riley. The sole government witness at trial was the victim. However, the prosecution introduced the deposition of a witness to the crime corroborating the victim's story. The witness had been in the stockade with Davis, but prior to trial had been returned to duty at Ft. Benjamin Harrison, approximately 900 miles away. Trial counsel had earlier denied a defense request to make this witness available at trial. Defense counsel objected to the use of the deposition, but was overruled by the law officer. The Court concluded that the deposition had played an important part in the government's case, thus precluding harmless error, and that the denial of the request for the personal appearance of the witness was based on the 100 mile clause of article 49, UCMJ.

The Court stated that depositions are an exception to the general rule of live testimony and are to be used only when the government cannot reasonably have the witness at trial. The Court stressed the importance of having the witness testify in court.

The Court then looked to the prerequisites for use of depositions. The only basis for use of the deposition in this case was that the witness was beyond one hundred miles from the place of trial. Other than his geographical location, there was no showing that the witness was "otherwise *unavailable* to testify in person or that the government made any effort to make such a determination." (emphasis supplied by the Court.) Citing *United States* v. *Ciarletta*,[179] *Barber* v. *Page*,[180] and *United States* v. *Obligacion*,[181] the Court held that since a serviceman subject to military orders is always within the jurisdiction of the military court, he is not unavailable simply because he is stationed more than one hundred miles from the place of trial.

It was then indicated by way of dictum that "military necessity" is an additional basis for use of a deposition. This situation occurs when the proposed witness is on an important military mission, or when, by virtue of military operations, it is impossible due to the performance of this duty to also be at the place of trial. This was not the case here.

Thus, the Court overruled the one hundred mile provision of Article 49, and held that, with regard to military witnesses, the government must establish actual unavailability, or military

[178] 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970).
[179] 7 U.S.C.M.A. 606, 23 C.M.R. 70 (1957).
[180] 390 U.S. 719 (1968).
[181] 17 U.S.C.M.A. 36, 37 C.M.R. 300 (1967).

necessity. Judge Darden concurred in the result, but felt that actual unavailability was not required in all cases. He would take into account the importance of the witness to the case and apply a reasonableness test, leaving the question to the sound discretion of the military judge.

This question next arose in *United States* v. *Hodge*.[182] The trial was held in Vietnam, and the government used, over defense objection, the depositions of two witnesses who had returned to the U.S. prior to trial and had been discharged. The Court refined the rules set out in *Davis* for use of depositions. It was stated that the government must meet two conditions: (1) the witness must be outside the boundaries of the State or Territory in which the Court is ordered to sit; and (2) for "reasonable cause" the witness is unable or refuses to appear and testify in person at the place of trial. Evidence of mere absence from the geographic area, as distinguished from evidence of actual unavailability is insufficient.

The Court then discussed those things that could be asserted as reasonable cause. It was assumed, without deciding, that a witness physically in the U.S. may be subpoened to testify at a court-martial in a foreign country. Certainly, immunity from process would amount to a showing of actual unavailability. The Court also assumed, without deciding, that attending a trial in a combat zone presents such grave danger to a civilian witness that this situation could be compared with that in which a witness may refuse to testify because of grave danger due to illness or disease. Thus, a civilian witness could refuse to testify in Vietnam and that refusal would be for reasonable cause. However, the government would presumably have to show that the question was put to the witness and that he did refuse in order to show actual unavailability. Further, a military witness could not refuse to testify for that reason. Finally, the Court assumed, without deciding, that mere unwillingness to testify is not tantamount to unavailability.

The real difficulty for the government in this case was the Court's holding that despite the fact that the civilian witnesses in this case might have reasonable cause to refuse to testify due to the trial being in a combat zone, the government was prevented from asserting the witness' inability to attend because they procured his departure from the area. Thus, the use of the depositions were erroneous. However, the Court found that the error was

[182] 20 U.S.C.M.A. 412, 43 C.M.R. 252 (1971).

not prejudicial in light of the fact that they contained nothing not admitted by the accused or proved by other evidence.

The final case in this area was *United States* v. *Gaines*.[183] Gaines was tried for unpremeditated murder and assault with a dangerous weapon in Vietnam. At trial, the depositions of prosecution witness McIntyre and defense witness Odom were admitted into evidence. Both men had returned to the United States.

The Court, referring to its decisions in *Davis* and *Hodge*, stated that the departures of both witnesses were effectuated by the government for its own convenience. McIntyre was returned to the U.S. and released from active duty prior to the expiration of his enlistment. Odom routinely rotated and was assigned to another military unit in CONUS. It was pointed out that both men were subject to military orders at the time of the trial, Odom as an active duty member and McIntyre as a member of a USAR control group. Thus, the government could not assert the witnesses' inability to attend as justification for use of the depositions. In the absence of a showing that the witnesses were actually unavailable the use of the deposition was erroneous.[184]

In addition to the deposition problem, the Court considered other matters concerning witnesses and their availability. In *United States* v. *Howard*,[185] the accused raised the defense of insanity. Following the recess during which a psychiatric board examined accused, the prosecution called the senior member of the board to testify. Two other members of the board who had examined accused, and upon whose work the senior member based his report, in part, were not called to testify. Trial defense counsel requested that one of the other examining members of the board be available at the resumption of the court-martial. This request was rejected because the convening authority determined that the requested witness was not necessary and material. When trial resumed defense counsel requested the witness again "for cross-examination." The Court held that nothing in the record indicated a defense request that the witness was desired as a defense witness. Rather, the defense wished him for cross-examination. It was held that this was a request the defense was not entitled to have fulfilled.

[183] 20 U.S.C.M.A. 557, 43 C.M.R. 397 (1971).

[184] McIntyre's deposition was a principal part of the government case. As to Odom, the defense had asked for his presence, but the government did not act promptly on the request and he returned to the U.S. The failure to act promptly, which would have enabled the government to keep him in country, denied accused the use of the witness and required him to use the deposition. This did not amount to a waiver of the right to have the witness in person.

[185] 19 U.S.C.M.A. 547, 42 C.M.R. 149 (1970).

Judge Ferguson dissented, stating that it was error to deprive accused of his right to cross-examine the witness. He felt that the fact that the medical board report was not introduced into evidence was not sufficient to prevent the defense from cross-examining one of the board members. Also, since the testimony of the senior doctor was based on the work of the other members, they were witnesses against the accused.

Finally, in *United States* v. *Sears*,[186] accused asked for several character witnesses. The military judge initially decided that the witnesses were necessary. However, the convening authority refused to provide them. The judge ordered the trial to proceed and at its conclusion reversed his finding as to the necessity of the witnesses to the defense case. The Court found this to be an improper capitulation by the military judge and reversed the finding and sentence.

I. *ADMISSION OF MORNING REPORTS*

Technical errors in AWOL documentation caused the Court only limited difficulty in *United States* v. *Bowman*.[187] The extract of the morning report listed no reporting unit and the 6th Army Overseas Replacement Station as the parent unit. The Court of Military Review apparently took judicial notice that the Replacement Station could have referred to either Oakland or Fort Lewis. On differing theories, the Court of Military Appeals upheld the judge's action in admitting the morning report extract. Judge Darden argued that it was unnecessary to specify the physical location from which Bowman was absent. Further, the specifications made clear that Bowman was absent from Oakland thus effectively protecting him from a possible later court-martial for an absence from Fort Lewis. Judge Quinn viewed the error as one of form rather than substance. Judge Ferguson, disassociated himself from Judge Darden's opinion, but found the extract was admissible to show an AWOL from Oakland.

VI. ARGUMENTS, INSTRUCTIONS AND SENTENCES

A. *ARGUMENT OF COUNSEL*

The Court decided several cases concerning counsel's closing argument. The most significant of these was *United States* v.

[186] 20 U.S.C.M.A. 380, 43 C.M.R. 220 (1971).
[187] 21 U.S.C.M.A. 48, 44 C.M.R. 102 (1971).

Weatherford,[188] which held that defense counsel may argue for a punitive discharge in lieu of confinement for his client. However, the argument must be in accordance with the express wishes of the accused and these wishes must be apparent on the record.[189]

Trial counsel's argument was also examined by the Court. In his closing argument in *United States* v. *Ryan*,[190] trial counsel intimated that the court members should attach more weight to government witnesses because they were higher in rank than those for the defense. He also stated a personal belief in the credibility of the government witnesses. This argument was prejudicially improper, and the case was reversed. Equally improper was trial counsel's statement in *United States* v. *Pettigrew* [191] that accused had perjured himself when the record was devoid of any such evidence. The Court concluded that there was a fair risk the court members had been influenced and reversed. In *United States* v. *Garza* [192] trial counsel made references to accused's political philosophy in aggravation. This was irrelevant and improper. Finally, trial counsel attempted, in a drug case,[193] to read a Secretary of the Navy instruction concerning drug abuse into the record. This amounted to improper command influence, and was cause for reversal.

B. *VOTING PROCEDURE*

The Court has insisted on fairly strict compliance with the Manual rules regarding the instruction of court members prior to their deliberations. The greatest number of cases involved the military judge's or president's failure to give any oral instructions pursuant to MCM, 76. *United States* v. *Hoff*,[194] observed that its holding was made obvious by prior decisions reversing more limited oral instructional failures. A closer case was *United States* v. *Pryor*.[195] There the law officer failed to orally instruct that voting on proposed sentences should begin with the lightest proposed. However, the law officer referred to a written sentence worksheet and a voting instruction worksheet which the trial counsel distributed to the court members. The documents prop-

[188] 19 U.S.C.M.A. 424, 42 C.M.R. 26 (1970).
[189] United States *v.* Schwartz, 19 U.S.C.M.A. 431, 42 C.M.R. 33 (1970); United States *v.* Freeland, 19 U.S.C.M.A. 455, 42 C.M.R. 57 (1970); United States *v.* Holcomb, 20 U.S.C.M.A. 309, 43 C.M.R. 149 (1971).
[190] 21 U.S.C.M.A. 9, 44 C.M.R. 63 (1971).
[191] 19 U.S.C.M.A. 191, 41 C.M.R. 191 (1970).
[192] 20 U.S.C.M.A. 556, 43 C.M.R. 376 (1971).
[193] United States *v.* Allen, 20 U.S.C.M.A. 317, 43 C.M.R. 157 (1971).
[194] 19 U.S.C.M.A. 246, 41 C.M.R. 246 (1970).
[195] 19 U.S.C.M.A. 279, 41 C.M.R. 279 (1970).

erly described the requirement for beginning with the lightest sentence. The majority was not convinced that an adequate substitute for the oral instruction was presented and accordingly reversed as to the sentence. Distinguishing other cases, they found no assurance in the record that the court members had considered the instructions in assessing their sentence. Judge Quinn in dissent found the law officer's oral discussion of the "voting instructions" as an "aid" was sufficient to comply with the dictates of the Manual.

A similar failure of instruction was considered in *United States* v. *Pierce*.[196] The Court noted that: "We have described [the "beginning with the lightest"] requirement as 'essentially' a part of military due process, and this omission normally requires reversal of a sentence. . . ." However, the court found the sentence of a bad conduct discharge and reduction to E–3 was extremely lenient under the circumstances. Therefore, "Pierce has not suffered a deprivation of a substantial right justifying invocation of the 'plain error' rule." Judge Ferguson dissented contending that the rule's stature of an essential part of military due process made reversal of the sentence automatic regardless of considerations of prejudice. In addition, Judge Ferguson found in the record substantial evidence of rehabilitation which may well have led a court to retain Pierce in service.

The use of a written memorandum on voting procedures was again examined in *United States* v. *Muir*.[197] The memorandum properly stated the requirements of MCM, 76*b*(2), (3), including the "lightest proposed sentence first" provision. In addition, the Judge orally instructed: "I remind you, as it is contained in that written voting instructions, that you take the lightest proposed sentence first to vote on." The majority of the Court was able to distinguish this situation from that involved in *United States* v. *Pryor*. It was held that the oral reference to the written instructions made it "reasonable to conclude that the court members did in fact make use of the entire instruction form in their consideration of the sentence. . . ." Judge Ferguson's dissent again reflected his displeasure with the abuse of an element of military due process.

Instructions regarding reballoting were considered in *United States* v. *McAllister*,[198] and *United States* v. *Boland*.[199] After deliberating for half an hour in McAllister's case, the president of

[196] 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970).
[197] 20 U.S.C.M.A. 188, 43 C.M.R. 28 (1970).
[198] 19 U.S.C.M.A. 420, 42 C.M.R. 22 (1970).
[199] 20 U.S.C.M.A. 83, 42 C.M.R. 275 (1970).

the court indicated there had been "an abstention" by one member and as a result an insufficient number of votes for a guilty finding. After some discussion, the president instructed that any member could request an additional ballot and that the members would "vote orally on the request." After several more closings and reopenings, the president announced that a guilty finding had been reached. On appeal, defendant noted two errors: (1) the president's reference to the result of the initial vote should be treated as "an announcement in open court" that the accused had been acquitted; (2) the instruction regarding an oral vote on reconsideration violated MCM, 74*d*(3)'s requirement of a "secret written ballot" vote. On the factual situation presented (including guilty pleas to two of the three charged offenses) the Court rejected the conclusion that the president had announced an acquittal after the initial balloting. Reversal was required as to the 74*d*(3) error for the one contested charge. A similar erroneous "oral reballoting" instruction was considered in *Boland*. The Court stated that such an error was "presumptively prejudicial" and that a silent record was insufficient to rebut the presumption.

C. *INSTRUCTIONS*

1. Accident.

In *United States* v. *Harrison*,[200] defendant was charged under Article 115 with malingering by intentionally wounding himself. Defendant claimed the weapon discharged while he was dozing off. An instruction "even though the act is unintentional, it is not excuseable [sic] where it was a result or incidental to an unlawful act" was reversible error on the facts of this case. The Court recognized that the instruction might have been acceptable in a homicide, assault or related case. However, in an intentional infliction of injury case the instruction misstated the law.

In *United States* v. *Martinez*,[201] defendant was charged with murder. An eyewitness testified that defendant pulled the victim to the ground, held the knife to his neck, and asked for money. When the victim tried to get up, the accused came down with his knife. Another eyewitness testified that it "seemed" to him that the accused lost his balance in bending over the victim and then came down with a punching movement when the victim attempted to rise. Defendant testified that he recalled nothing of the incident due to intoxication. Defendant requested and was

[200] 19 U.S.C.M.A. 179, 41 C.M.R. 179 (1970).
[201] 20 U.S.C.M.A. 228, 43 C.M.R. 68 (1970).

denied an instruction on involuntary manslaughter. An evaluation of the testimony and the number of wounds inflicted demonstrated to the court "beyond all reasonable doubt that the stabbing was not inadvertent." Additionally, the Court found significant the members' rejection of the instructed lesser offense of unpremeditated murder. Judge Ferguson dissented noting that an instruction is required any time there is some evidence in the record to which the members may attach credit. Judge Ferguson found the evidence did suggest the possibility of inadvertence and an involuntary manslaughter instruction was required.

2. Character.

Defendant in *United States* v. *Wright*,[202] was charged with indecent liberties with an eight-year-old child. Defendant sought an instruction on good character which was refused. The Court, although noting that good character alone could raise a reasonable doubt to an otherwise prima facie case, found no error. It determined that no prejudice occurred since the defendant admitted the commission of the act in a pretrial statement. Judge Ferguson dissented, noting that defendant had not made a judicial admission of his guilt and had challenged the validity of the pretrial statement.

In *United States* v. *Payne*,[203] defendant denied that he had sexually molested the ten-year-old victim. Defense sought and was refused an instruction that a conviction "cannot be based upon uncorroborated testimony given by an alleged victim in a trial for a sexual offense, if the testimony is self-contradictory, uncertain, or improbable." On appeal, the Court recognized the instruction as a correct statement of law and found it appropriate to the facts of the case. The Court noted the absence of corroborative evidence and noted the substantial danger of prejudice to the defendant.

3. Disloyalty.

The law officer in *United States* v. *Harvey*,[204] defined disloyalty to include being unfaithful toward an "authority to whom respect, obedience or allegiance is due." The Court of Military Appeals reversed, holding that the instruction did not make clear that the disloyalty could only be toward the United States and not to the Marine Corps or another governmental agency. Further, there was a failure to instruct that a disobedience to orders

[202] 20 U.S.C.M.A. 12, 42 C.M.R. 204 (1970).
[203] 19 U.S.C.M.A. 188, 41 C.M.R. 188 (1970).
[204] 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).

was not per se equivalent to disloyalty. The case was returned for resentencing after a finding that Harvey was guilty of a lesser included offense.

4. Flight.

In *United States* v. *Buchana*,[205] defendant was charged with robbery and assault with intent to commit robbery. The charges arose out of a confrontation between defendant and two fellow black soldiers and two white soldiers. The whites testified that Buchana's friends had set upon them and that Buchana approached one white with a clenched fist. One white soldier testified that his wallet was removed and the other that he "believed an attempt was made to remove his." Buchana claimed that the fight was precipitated by a racial slur and that he became involved solely to help his friends. The evidence indicated "that the alleged removal of [the] wallet and the attempted removal of [the other] wallet had already occurred by the time the appellant tried to help. . . ." There was evidence that the three blacks left the area immediately after the incident occurred.

Discussing the specific intent to rob, the law officer instructed: "As soon as these acts occurred, the three Negroes, including the accused, immediately ran from the scene. Now, this evidence would give rise to the fact, would give rise to the inference, that there was a concert of action and a purpose to commit the offense of robbery." Reviewing the instruction, the Court of Military Appeals noted that flight from the scene would support an inference of guilt as to some offense. However, it observed that the inference "could be drawn for his offense of assault . . . as easily as it could be drawn for his acting in concert with others in the commission of robbery or attempted robbery." This incorrect statement of the inference required a reversal of the case.

5. Other Offenses.

In *United States* v. *Gold*,[206] defendant was charged with desertion. Evidence introduced to prove intent also suggested that Gold had violated a brig regulation. The law officer's failure to instruct that this matter should not be considered was error and a reversal was required.

In *United States* v. *Ogden*,[207] defendant was tried and convicted of a seven-month AWOL. At findings defense introduced evidence

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[205] 19 U.S.C.M.A. 394, 41 C.M.R. 394 (1970).
[206] 20 U.S.C.M.A. 60, 42 C.M.R. 252 (1970).
[207] 20 U.S.C.M.A. 193, 43 C.M.R. 33 (1970).

of a civilian housebreaking conviction and defendant admitted his fraudulent enlistment in the Marine Corps. Since the new Manual provisions, which would have allowed admission of this evidence, were not in effect, the Court of Military Appeals found error in the failure to provide a limiting instruction.

6. Effect of Guilty Plea.

The defendant in *United States* v. *Prater* [208] entered guilty pleas to some of the charges against him and not guilty pleas to others. At sentence the judge instructed that a guilty plea may be evidence in mitigation. On appellate review it was argued that the judge's instruction implied to the court members that a not guilty plea was an aggravating circumstance. The Court examined defendant's contentions and found no basis in reality for the assumption that the members would take such a two-edge meaning from the instruction.

7. Sale of Drugs.

United States v. *Stewart* [209] considered the culpability of the unwilling drug seller. Defendant was charged with the sale of marihuana. He testified that he acted in response to the bidding of a CID agent and made no profit from the transaction. This contention was vigorously disputed in the CID agent's testimony. A requested instruction that defendant's story, if true, would provide a defense was rejected by the court. The Court of Military Appeals reversed. They held that defendant would not be guilty of a sales offense if his account of his conduct was true. Further defendant's testimony alone was sufficient to raise the issue and require a sua sponte instruction.

D. *ALLOCUTION RIGHTS*

While consistently granting his right to do so, several decisions of the Court elaborated on the nature of defendant's privilege to speak in his own behalf prior to sentencing. In *United States* v. *Williams*,[210] defendant did not testify in his own behalf. On appeal he contended that he was never advised of his right to make a statement prior to sentencing. The Court found that neither statute nor the Manual required the judge to advise the defendant of the right of allocution. However, the Court strongly urged that such a practice be followed.

Similar results occurred from the similar factual situations

[208] 20 U.S.C.M.A. 339, 43 C.M.R. 179 (1971).
[209] 20 U.S.C.M.A. 300, 43 C.M.R. 140 (1971).
[210] 20 U.S.C.M.A. 47, 42 C.M.R. 289 (1970).

in *United States* v. *Wilburn*,[211] and *United States* v. *Taylor*.[212] Judge Ferguson dissented on the facts in *Wilburn*. His dissent suggested the considerable importance he gives to the allocution right. Despite the lack of a specific requirement for judicial instruction on MCM, 75*c*(2), Judge Ferguson argued that the record shall specifically reflect defendant's knowledge and understanding of his allocution right. As with the counsel explanation of *United States* v. *Donohew* [213] and the guilty plea requirements of *United States* v. *Care* [214] a silent record would not satisfy that requirement.

E. *SENTENCES*

United States v. *Walter* [215] resolved the dispute over the maximum sentence for the wrongful sale of LSD. The defense claimed a two-year maximum for an Article 92 violation of a general order prohibiting usage of the drug. The government argued for a five-year maximum corresponding to the federal penalty under the United States Code. The majority began by noting that "the punishment prescribed by the civilian statute is generally controlling." One exception is where the misconduct is a lesser included offense to another offense in the Table of Maximum Punishments or closely related to another Code offense. Neither exception was applicable here. The Court then noted a goal of the Table of Maximum Punishments is to ensure comparable punishment with civilian offenses. Accordingly, the maximum punishment was set at five years. Judge Ferguson in dissent cited MCM, para 27's intent to charge offenses under a specific article rather than under Article 134. Here defendant's action was clearly in contravention of Article 92. As such a two-year maximum punishment was authorized.

The appropriate sentence at rehearing faced the Court in *United States* v. *Darusin*.[216] Defendant had initially been sentenced to five months' confinement at hard labor and a bad conduct discharge. On review the proceedings were reversed and remanded. At the rehearing defendant indicated a desire to plead guilty to the single charge remaining. The judge informed him that upon conviction he could be sentenced to five months' confinement at hard labor and a bad conduct discharge or to one

[211] 20 U.S.C.M.A. 86, 42 C.M.R. 278 (1970).
[213] 20 U.S.C.M.A. 93, 42 C.M.R. 285 (1970).
[212] 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969).
[214] 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).
[215] 20 U.S.C.M.A. 367, 43 C.M.R. 207 (1971).
[216] 20 U.S.C.M.A. 354, 43 C.M.R. 194 (1971).

year confinement at hard labor without discharge. Defendant raised no objection and his guilty plea was accepted. The judge then imposed sentence of a bad conduct discharge and confinement at hard labor for five months with credit for time served.

On appeal it was argued that the judge had misadvised as to the maximum penalty. The Court rejected this contention. They noted that UCMJ 63(b)'s provision that no sentence at rehearing could be more severe than the original sentence offered some room for interchanging penalties. Given the significance of a bad conduct discharge, a substitution of seven months' confinement at hard labor was not held to be excessive. Further if error had occurred there was no indication it had affected the voluntariness of the plea.

VII. EXTRAORDINARY RELIEF

The wide variety of petitions presented on the Court's miscellaneous docket reflected the growth of extraordinary relief in the military since the 1966 decision in *United States* v. *Frischholz*.[217] While the Court continued to recognize its extraordinary relief powers, actual grants of relief were rare. A considerable percentage of the year's cases involved conditions of confinement. The most notable decision was *Collier* v. *United States* [218] in which the Court divided both as to the result and on the broader question of the Court's jurisdiction in extraordinary relief matters.

Collier had been convicted by general court-martial and ordered confined by General Ryan, the convening authority at Camp Lejeune, pending appellate review. Collier was taken to the U.S. Naval Disciplinary Command at Portsmouth, New Hampshire, for confinement. There he requested a deferment of confinement from the officer exercising general court jurisdiction over the Disciplinary Command. This request was granted and Collier was promptly shipped back to Camp Lejeune. Shortly after his return, General Ryan, citing the same facts that led to his initial refusal to defer confinement, ordered Collier reconfined. At this point the well-traveled marine sought extraordinary relief from the Court of Military Appeals. The Court reviewed the legislative history of UCMJ article 57(*d*) authorizing deferment of sentence until completion of appellate review. Noting the obvious impasse in this case the Court held that General Ryan needed something more than a restatement of the original facts to rescind the validly issued New Hampshire deferment order. The

[217] 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).
[218] 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970).

petition for appropriate relief was granted and Collier ordered released from custody.

In a vigorous dissent Judge Darden found no relation between the legality of petitioner's restraint and the ability of the Court of Military Appeals to entertain a petition for review of his trial "at such time as that petition may be ripe for presentation." Reviewing the history of All Writs practice in the military, Judge Darden contended that only a limited class of actions were subject to extraordinary remedy. The Court of Military Appeals has "only powers to prevent that potential jurisdiction from being thwarted, not powers to regulate every step of the proceedings by which a case later subject to our review is developed." Finding no jurisdictional impediment, Judge Darden would have dismissed the petition. Pretrial confinement claims failed to show abuse of discretion by the convening authority in *Horner* v. *Resor*,[219] (mere fact of special court trial doesn't insure lack of confinement), *Mitchell* v. *Laird*,[220] (subsequent AWOL offense justifies initial AWOL confinement), and *Autry* v. *Hyde*,[221] (no abuse in confining charged deserter previously removed from Canada).

Denial of a post trial deferment of sentence was found in *Green* v. *Wylie*.[222] The Court reiterated the *Collier* position that deferment lay within the sound discretion of the convening authority. Here evidence of defendant's juvenile record as a runaway could be considered in reaching a deferment decision. In *Lopez* v. *Resor* [223] the Court denied the request for among other reasons petitioner's failure to file an appropriate request for deferment of sentence.

The Court reaffirmed past practice of refusing to examine administrative decisions on a petition for extraordinary relief. In *Herrod* v. *Convening Authority*,[224] the Court found no jurisdiction to award petitioner a combat decoration. Similarly, in *Hurt* v. *United States*,[225] the Court was powerless to grant requested back pay for a period after expiration of defendant's enlistment but prior to the reversal of his court-martial conviction.

Numerous requests for pretrial assistance were also denied by the Court. In *MacDonald* v. *Hodson*,[226] the Court did consider the

[219] 19 U.S.C.M.A. 285, 41 C.M.R. 285 (1970).
[220] 20 U.S.C.M.A. 195, 43 C.M.R. 35 (1970).
[221] 19 U.S.C.M.A. 433, 42 C.M.R. 35 (1970).
[222] 20 U.S.C.M.A. 391, 43 C.M.R. 231 (1971).
[223] 21 U.S.C.M.A. 7, 44 C.M.R. 61 (1971).
[224] 19 U.S.C.M.A. 574, 42 C.M.R. 176 (1970).
[225] 19 U.S.C.M.A. 584, 42 C.M.R. 186 (1970).
[226] 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970).

merits of petitioner's claim that he was entitled to a public article 32 hearing. The Court, however, concluded that the proceeding was not a trial and could be held in private. A second *MacDonald*,[227] petition requested disqualification of an assistant trial counsel for a previous involvement with the defense. The Court refused to grant extraordinary relief relying on the military judge to resolve the matter if the case was referred to trial.

The petitioner in *Osborne* v. *Bowman* [228] had no greater success in challenging the Article 32 officer's lack of qualifications and his improper consideration of evidence. Also found subject to normal review was the denial of a continuance motion where a new defense counsel had entered the case only two days previously.

Various war crimes proceedings also prompted requests for the Court's extraordinary relief. Petitioner in *Hutson* v. *United States*,[229] failed in an effort to have the summary court officer supply him with investigators. Petitioner Doherty, sought a delay of the highly publicized Lieutenant Calley proceedings to avoid prejudice to his article 32 hearing. The Court noted that no showing of prejudice on the part of Doherty's hearing officer had been shown and denied the petition.[230] Access to the Army Peers' Commission Report was denied to petitioner Henderson,[231] on the ground that no part of the report had been placed in evidence.

The most imaginative My Lai petition was brought in *Medina* v. *Resor*.[232] Medina claimed the existence of a conspiracy to keep him from testifying as a witness in the court-martial of Lieutenant Calley. He further sought prohibition on referring charges against him to court-martial. The Court of Military Appeals noted the speculative nature of Medina's claims, stated that the calling of witnesses lay in the sound discretion of the trial counsel and observed that normal appellate relief could resolve Medina's complaints.

The exceptional case granting extraordinary relief was *Petty* v. *Convening Authority*.[233] Charges against Petty had been referred to a special court-martial. After Petty had requested the presence of witnesses the special court-martial charges were withdrawn and the case submitted to an Article 32 investigator.

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[227] 19 U.S.C.M.A. 585, 42 C.M.R. 187 (1970).
[228] 20 U.S.C.M.A. 385, 43 C.M.R. 225 (1971).
[229] 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970).
[230] Doherty *v.* United States, 20 U.S.C.M.A. 163, 43 C.M.R. 3 (1970).
[231] Henderson *v.* Resor, 20 U.S.C.M.A. 165, 43 C.M.R. 5 (1970).
[232] 20 U.S.C.M.A. 403, 43 C.M.R. 243 (1971).
[233] 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971).

The Court found no justification for the convening authority's unusual action and granted the request for prohibition to enjoin the Article 32 investigation. Judge Darden in dissent reaffirmed his Collier position that the Court was not acting in aid of its jurisdiction. Judge Darden noted the irony of taking extraordinary action to prevent a general court-martial which might be subject to the normal appellate review process.

RECENT DEVELOPMENTS

Jury Assessment of the Death Penalty: *McGautha* v. *California*, 402 U.S. 183 (1971)*

May 3, 1971, marked another step in the development of civil precedents directly applicable to military law. On that date, the Supreme Court of the United States decided *McGautha* v. *California* and *Crampton* v. *Ohio*,[1] holding both that it was proper for the same jury which decided guilt or innocence to decide the penalty and that it was constitutionally permissible for the jury to impose the death penalty with no standards to guide it.

McGautha and his co-defendant were charged with committing two armed robberies and a murder. At the penalty trial, which took place on the day following the conviction and before the same jury, the State waived opening, presented evidence of McGautha's prior felonies, and rested. Both defendants testified in their own behalf, each alleging the other had fired the fatal shot.

The jury was instructed as follows:

> [I]n this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.
>
> The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now in arriving at this determination you should consider all of the evidence received here in court presented by the People and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand. . . .
>
> Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and

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*The opinions expressed are those of the author and do not necessarily represent those of any governmental agency.

[1] 402 U.S. 183 (1971), 91 S. Ct. 1454, *affirming*, 70 Cal.2d 770, 452 P.2d 650 (1969), and 18 Ohio St. 182, 248 N.E.2d 614 (1969).

> absolute discretion. That verdict must express the individual opinion of each juror.
>
> Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.[2]

The jury returned verdicts of life imprisonment for the co-defendant and death for McGautha.

Crampton was indicted for the murder of his wife. He pleaded not guilty and not guilty by reason of insanity. His guilt and punishment, in accord with Ohio practice, were determined in a single proceeding. The state's principal witness was a convicted felon who had spent most of the time until shortly before the murder with Crampton. The defense called Crampton's mother who testified to his childhood problems, his marriages and divorces, his drug addiction and his undesirable discharge from the Navy. The defense also introduced a series of hospital reports reflecting Crampton's substantial criminal record, his court-martial conviction, the absence of any significant employment record, and his claim that the shooting was accidental.[3]

The jury was instructed on the death penalty as follows:

> If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life.[4]

It was instructed on its verdict generally:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict.
>
> Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy, or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.[5]

The jury returned a first degree murder verdict without a recommendation for mercy.

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[2] 91 S. Ct. 1454, 1458.
[3] *Id.* at 1460.
[4] *Id.* at 1461.
[5] *Id.*

The Supreme Court formulated the first issue in the cases in this way:

> We consider first McGautha's and Crampton's common claim: that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law.[6]

The Court then proceeded to review the history of the death penalty and the efforts to define standards for its use. It noted that the "history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die." [7] Among the standards tried and found unsatisfactory were ones evaluating "malice aforethought" and "willful, deliberate, and premeditated" acts. The Court observed that juries would simply ignore such strictures to return a verdict corresponding to its sense of fairness. Accordingly, legislative bodies "adopted the method of forthrightly granting juries the discretion which they had been experiencing in fact." [8]

The Court then concluded on this issue:

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untramelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boilerplate" or a statement of the obvious that no jury would need.[9]

On the second question of a unitary trial, the Court held:

> The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. . . . Although a defendant may have a right,

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[6] *Id.*
[7] *Id.* at 1462.
[8] *Id.* at 1463.
[9] *Id.* at 1467–68.

> even of constitutional dimensions, to follow whichever course he chooses,' the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved. Analysis of this case in such terms leads to the conclusion that petitioner has failed to make out his claim of a constitutional violation in requiring him to undergo a unitary trial.[10]

In writing for the Court, Mr. Justice Harlan (deceased) spoke for himself and Justices Burger, Stewart, White and Blackmun. The late Mr. Justice Black wrote a separate opinion concurring in the result.[11] Justice Douglas and Brennan each wrote dissenting opinions and joined the dissenting opinion of the other.[12] Justice Marshall joined in both dissents. The opinions total 130 pages in the official reporter, and contain enough material digressing from the issues at hand to provide commentators with material for years. The Court did not have before it, and did not decide the constitutionality of the death penalty, through Justice Black indicated he thought it was constitutional.[13] The Court has before it for the beginning of the October 1971 Term several cases directly challenging the validity of the death penalty in light of the Eighth Amendment's prohibition of cruel and unusual punishment.[14] We thus have those decisions to look forward to.

The military method of assessment of the death penalty seems clearly validated by the *McGautha-Crampton* decision. The *Uniform Code of Military Justice* [15] and the *Manual for Courts-Martial* bifurcate the trial permitting the defendant a less awesome choice as to whether he will speak or remain silent, thus escaping even Justice Douglas' condemnation of "death-oriented" trials. The current Manual provides that the determination of a proper punishment for an offense rests within the discretion of the court subject to the limitations prescribed in the Table of Maximum Punishments [16] and by the article violated.[17] The paragraph concludes: "To the extent that punishment is discretionary, the sentence should provide a legal, appropriate, and adequate

[10] *Id.* at 1470.
[11] *Id.* at 1476.
[12] *Id.* at 1477, 1487.
[13] *Id.* at 1476–77.
[14] *See, e.g.*, Aikens *v.* California, 91 S. Ct. 2280 (1971); Furman *v.* Georgia, 91 St. Ct. 2282 (1971); Jackson *v.* Georgia, 91 S. Ct. 2287 (1971).
[15] The Code is codified at 10 U.S.C. §§ 801–940 (SUPP. V 1970).
[16] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. EDITION), [hereafter cited as MCM, 1969 (REV.)], ch. XXV.
[17] *Id.* at para. 76*a*(1).

punishment." [18] The following paragraph requires a court-martial with members to be instructed on punishment:

> Before a court-martial closes to deliberate and vote on the sentence, the military judge, or the president of a special court-martial without a military judge, must give appropriate instructions on the punishment, to include a statement of the maximum authorized punishment which may be imposed. The instructions should be tailored to fit the facts and circumstances of the individual case and should fully inform the members of the court-martial on their sole responsibility for selecting an appropriate sentence and that the court-martial may consider all matters in extenuation and mitigation as well as those in aggravation, whether introduced before or after the findings; evidence admitted as to the background and character of the accused; and the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits of good character."

Thus the members of the military court are given the same unfettered discretion in sentencing, with the same type of unstructured reference to their conscience as was given the *Crampton* jury by Ohio in a very few words or the *McGautha* jury by California in a much longer statement. The only basic difference in the procedures (other than Ohio's unitary trial) in the two states examined and the military is that in the military the numbers who must concur in the sentence increases as the severity of the punishment increases. As prescribed by the Code sentences of 10 years confinement or less require a 2/3 majority, sentences of confinement in excess of 10 years require 3/4 of the members to agree, and death sentences require the concurrence of all of the members.[20] California, explicitly, and Ohio, by implication, required unanimity on either a life or death sentence. Thus, the military change in the required percentages may work as some deterrent to the imposition of the death penalty. The constitutional validation of the California and Ohio death sentence procedures thus clearly also validates the similar procedures in the military.

Now we are left to wonder whether the Court, by its June 28, 1971, decisions setting aside some 30 death sentences,[21] gave some further intimation of what it will do next in this area. The

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[18] *Id.*

[19] *Id.* at para. 76*b*(1).

[20] Uniform Code of Military Justice, art. 52.

[21] Leaving approximately 120 capital cases on its docket, including some direct challenges to the death penalty on which it granted certiorari the same day. *See, e.g.*, Aikens *v.* California, 91 S.Ct. 2280; Furman *v.* Georgia, 91 S.Ct. 2282; Jackson *v.* Georgia, 91 S.Ct. 2287.

Court, in each of its memorandum opinions [22] cited either *Witherspoon* v. *Illinois*,[23] holding that individuals with scruples against the death penalty cannot be automatically kept off juries, or *United States* v. *Jackson*,[24] holding that a provision permitting only a jury to impose a death sentence was constitutionally invalid as impinging on the right to jury trial and encouraging incrimination by a guilty plea to insure continued life.[25]

Whatever constitutional validation of the death penalty or its mode of assessment that we have received or are about to receive from the Supreme Court, we may be sure that the policy of the imposition of the penalty will continue to be a matter of concern and discussion. No executions have taken place in the United States since June of 1967 because of stays granted by lower courts pending decision of test cases by the Supreme Court. The matter has been studied by groups ranging from organizations formed specifically to fight the death penalty [26] to National and Royal Commissions.[27] As legal technicians, we are assured by *McGautha* that our procedures are correct. As professionals forecasting national policy in this area, we might well advise our clients that some change is possible.

BENJAMIN WALL**

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[22] Adams *v.* Washington, 91 S.Ct. 2273; Mathis *v.* New Jersey, 91 S.Ct. 2277; Funicello *v.* New Jersey, 91 S.Ct. 2278; Childs *v.* North Carolina, 91 S.Ct. 2278; Mathis *v.* Alabama, 91 S.Ct. 2278; Speck *v.* Illinois, 91 S.Ct. 2279; Segura *v.* Patterson, 91 S.Ct. 2280; Whan *v.* Texas, 91 S.Ct. 2281; Duplessis *v.* Louisiana, 91 S.Ct. 2282; Jaggers *v.* Kentucky, 91 S.Ct. 2282; Aiken *v.* Washington, 91 S.Ct. 2283; Wheat *v.* Washington, 91 S.Ct. 2283; Atkinson *v.* North Carolina, 91 S.Ct. 2283; Pruett *v.* Ohio, 91 S.Ct. 2284; Quintona *v.* Texas, 91 S.Ct., 2284; Wigglesworth *v.* Ohio, 91 S.Ct. 2284; Hunter *v.* Tennessee, 91 S.Ct. 2285 (4 cases); Crain *v.* Beto, 91 S.Ct. 2286; Wilson *v.* Florida, 91 S.Ct. 2286; Pemberton *v.* Ohio, 91 S.Ct. 2287; Hill *v.* North Carolina, 91 S.Ct. 2287; Ladetto *v.* Massachusetts, 91 S.Ct. 2288; Roseboro *v.* North Carolina, 91 S.Ct. 2289; Turner *v.* Texas, 91 S.Ct. 2289; Williams *v.* North Carolina, 91 S.Ct. 2290; Bennett *v.* Illinois, 91 S.Ct. 2290; Souders *v.* North Carolina, 91 S.Ct. 2290; Tajra *v.* Illinois, 91 S.Ct. 2291; Thomas *v.* Luke, 91 S.Ct. 2291; Harris *v.* Texas, 91 S.Ct. 2291; Atkinson *v.* North Carolina, 91 S.Ct. 2292.

[23] 391 U.S. 510 (1968).

[24] 390 U.S. 570 (1968).

[25] For the benefit of those who like to speculate on the votes of individual justices, we note that Mr. Justice Stewart, with the majority in McGautha, wrote the majority opinions in both Witherspoon and Jackson.

[26] *E.g.*, CALM or Citizens Against Legalized Murder, Inc.

[27] *E.g.*, National Commission on Reform of Federal Criminal Laws, Final Report (1971), and Report of Royal Commission on Capital Punishment, 1949-1953.

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BOOK REVIEWS

Destroy or Die: The True Story of Mylai, Martin Gershen, Arlington House, 1971;
My Lai 4, Seymour Hersh, Random House, 1970;
One Morning in the War, Richard Hammer, Coward, McCann & Geoghegan, 1970

The My Lai tragedy has been the subject of several books, the most recent of which is *Destroy or Die*, by Martin Gershen. Earlier accounts include *My Lai 4*, by Seymour Hersh, who first brought reports of the killings at My Lai to the public's attention, and *One Morning in the War*, by Richard Hammer, which sets forth the thesis that the ill-famed soldiers of Charlie Company attacked the wrong target on 16 March 1968. The events described are basically the same in all three versions, although the particular philosophical bent of each author colors the reader's reaction to the so-called My Lai massacre.

Seymour Hersh's "report on the massacre and its aftermath," contained in *My Lai 4*, won several awards for the scope of its coverage, and remains perhaps the most revealing book as to actual events. The author draws his facts from interviews with many of those who were present at My Lai. His interviews result not only from his ambitious pursuit of the veterans of Charlie Company's assault, but also from their statements given during the Army's several investigations. *My Lai 4* is best when the participants themselves speak of the horrors of the day. The author's narrative adds little to their grim pictures. It should be noted, however, that many of the ugly facts recounted by witnesses were modified to some degree in their later testimony at the various My Lai trials. Much of *My Lai 4* is devoted to what occurred after the incident, but before the trials of those accused remaining in the Army, leaving an incomplete picture of the aftermath. Another weak point is the author's reliance on fragmented news accounts and speculative reporting to fill out his story. The reader senses that the author has a certain fascination with things military but lacks a proper background to grasp their meanings with assurance. *My Lai 4* must be read with an awareness that while its revelations largely retain their initial validity, they hang together in a loose and incomplete manner because of the author's rush to get them into print.

Richard Hammer is the most literate and readable analyst of the

My Lai incident. His best contribution to the history of this most grievous experience of the Army in Vietnam is not *One Morning in the War* but rather his new book on the Calley trial. *One Morning in the War* is valuable nonetheless for its compassionate insight into problems of the Vietnam conflict generally. His theme that the troops assaulting My Lai were attacking the wrong village is based mostly on armchair fictionalizing and is not borne out by the testimony of the staff officers responsible for the planning and execution of the operation which encompassed the fatal events at My Lai. The author of *One Morning in the War* repeats essentially the same tragic tales told in *My Lai 4* but he keeps them in perspective, remarking at one point that "In the heat and the passion of that morning, it is almost impossible to know who is telling the real truth about any of the events or any of the people, or if there is even any real truth." The wisdom of this observation was seen in the Army's difficulty in prosecuting the My Lai cases. It is unfortunate that *One Morning in the War* is predicated as an incorrect premise, for it is by far the best writing on the subject.

Destroy or Die by Martin Gershen purports by subtitle to be "the true story of My Lai". Instead of shedding any light on what happened, it adds only a confusing apology for the already well-documented murderous behavior of a fair number of American soldiers at My Lai. The author makes a well intentioned attempt to explain the sickness and frustration experienced by the men of Charlie Company in the weeks preceding the combat assault, but fails in the end to stir a genuine sympathy for those who participated in the slaughter. His portrait of the personalities who comprised Charlie Company is sufficiently vivid but somehow does not enable the reader to understand the madness which overtook the company at My Lai. Perhaps the worst aspect of *Destroy or Die* is not the author's futile grappling for justifiable motivations in the brutal acts which occurred, but his carelessness in assembling the supporting facts. While his criticisms of Hersh's and Hammer's theories may be partially sustained, the author of *Destroy or Die* himself resorts to senseless sensationalism, inaccurate information and incomplete facts to carry out his rationalizations. In brief, the book is bad, so bad that neither its hard cover nor promising subtitle can save it from being a waste of time and money for the intelligent reader.

It is impossible, in spite of all the gruesome facts which have surfaced about My Lai, to obtain a comprehensive understanding of what happened and why. *My Lai 4*, *One Morning in the War*

and even *Destroy or Die*, provide some glimpses into the subject in general, but the total implications found in the tragic horrors of that day in March 1968 may never be realized. These books do, however, contribute some appreciation of the events at My Lai and their repercussions. For this reason they should be considered by anyone concerned with the nature of men's madness in the cauldron of the Vietnam war.

CAPTAIN NORMAN G. COOPER*

Homosexuals and the Military: A Study of Less than Honorable Discharge
by Colin J. Williams and Martin S. Weinberg,
Harper & Row, 1971.

This seems to be the year for the Gay Liberation Movement. Books and movies dealing with the once taboo subject of homosexuality are appearing with increasing frequency on today's scene. One of these works, *Homosexuals and the Military*, by Colin J. Williams and Martin S. Weinberg of the Kinsey Institute for Sex Research, incorporates this present popular theme with another—the United States Military establishment. From its formidable title, it was expected that the authors would remove the scales from our eyes concerning a subject which has been a problem in the military for decades; that they would answer the question what causes and why is there homosexuality; or that they would offer valid prescriptions for dealing with and treating homosexuals based upon their research. Contrary to expectations, the book accomplished none of these.

The authors have attempted to examine the labeling of persons as "deviants" and "undesirable" through the use of less than honorable discharges by the military and the later effect this label has on the homosexual. Two central questions guided their research into these areas:

> 1. What are the processes whereby a person comes to be labeled homosexual by military authorities? To what extent does his own behavior contribute to his being labeled?
> 2. What are the consequences of being officially labeled, of leaving the military with a less than honorable discharge? What are the effects upon a person's perception of himself and others once he has been adjudged "undesirable"? What are the consequences regarding his life chances, his deviant career, and his relationship to the conventional world?

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The method used by the authors involves a comparison between a group of homosexual men who received honorable discharges from the armed services and a comparable group who received less than honorable discharges. It is based upon questionnaires and interviews with members of two prominent homophile organizations, the Mattachine Society of New York and the Society for Individual Rights (S.I.R.) in San Francisco. In addition to the data collected by the authors themselves, they have utilized data from a "more general" study of 458 Chicago homosexuals carried out by the Institute for Sex Research in 1967.

In answer to the first question, the authors discovered that the less than honorably discharged group usually came to the attention of military authorities in one of three ways: those individuals being informed upon directly or indirectly; the individuals voluntarily admitting they were homosexuals; or the specific indiscretions of such individuals. In drawing their comparison, the authors found that the less than honorably discharged group experienced higher frequencies of homosexual sex at the time of their induction; engaged in more frequent homosexual sex while in the military; and were more likely to report having other servicemen as their usual sexual partners during their period of service. From a practical standpoint, this information may be of benefit to the military lawyer in understanding the ways in which a homosexual may contribute to effecting his own discharge, but it is doubtful whether it would be of much use in prosecuting or defending a board action.

While the authors admit that the discovery of homosexuals did exhibit certain patterns, and did not necessarily involve arbitrary selection procedures by the military, they thereafter undertake to comment adversely upon the policy, attitudes and administrative procedures of the military subsequent to identification of the individual as a homosexual. However, it is the reviewer's opinion that this is a relevant subject which the authors do not adequately illuminate. Initially, in their review of administrative procedures from 1940 to the present time, they neglect to mention the fact that Army Regulation 635–89 has been superseded by Change 8 to Army Regulation 635–212. While this may be a small inaccuracy, it is believed that a book published in 1971 should reflect present procedures. Today, individuals being eliminated for homosexuality are given the same rights and alternatives as any other member who is found to be unfit for further military service.

Rather than suggest alternatives or revisions to present policy and procedures, the authors simply join in the present fashionable

criticism of the military establishment. They cite cases of alleged coercive interrogation by military investigators, complicity by chaplains and psychiatrists, and alleged unconstitutional administrative procedures to force an individual into an undesirable discharge. These cases are too abridged and opinionated to be of much use to the military lawyer. They have been recounted by members of militant homophile organizations and may well be exaggerated. Even the authors were forced to admit that in their research they found no cases of "people who demanded their rights and really made a fight of it." This supports the reviewer's experiences which indicate that individuals recommended for elimination for homosexuality usually seek discharge rather than request a board hearing.

What the authors neglect to emphasize is the fairness of administrative elimination proceedings. This is so even though they unequivocally state that: "Members of our sample did not appear to have suffered from a 'bum rap,' in that, regardless of the propriety of these rules, they had engaged in a type of behavior which, as members of a certain social system, was expressly proscribed." Present Army regulations which authorize the discharge of homosexuals with an undesirable discharge require the service member to be advised fully in writing of the reasons for discharge. With the assistance of counsel, he may demand a board and/or submit any rebuttal or mitigation he desires. Only after a review of the case, to include anything submitted by the member, by all intermediate commanders is the case referred to the general court-martial convening authority. He may disapprove the request for discharge or convene a board to hear the case. If a board is convened, which must be done if requested, the respondent is represented by a military lawyer, and he may hire civilian counsel should he desire. He may challenge board members for cause; request witnesses, who will be produced if reasonably available; submit any statements or depositions he desires; testify if he desires; and cross-examine any witnesses presented by the Government. When possible, Government witnesses will appear before the board in person. If personal appearance is not feasible, the respondent is given notice of the intended use of a statement of an absent witness and afforded the opportunity to meet adverse allegations. The respondent is entitled to be present at all open sessions of the board. Further, the convening authority can neither increase the severity or the character of discharge recommended by the board, nor order discharge if the board recommended retention. He may, however, ameliorate any board recom-

mendation. Finally, there are regulatory prohibitions against administrative double jeopardy. The rights and safeguards afforded a military respondent under administrative discharge proceedings fully satisfy the requirements of the Administrative Procedure Act.

It should be recognized that the Army does not eliminate individuals with an undesirable discharge merely because they are homosexuals. The regulation requires that consideration for elimination action which could lead to an undesirable discharge be given only in cases involving overt homosexual acts during the individual's military service. These are the same acts of sexual perversion for which an individual could be charged, tried, convicted and incarcerated in most civil jurisdictions. This is a fact that the authors have chosen to ignore.

In answer to their second question, the authors adequately developed the effects of the types of discharges issued in homosexual cases, comparing members receiving honorable discharges with those who received other than honorable discharges. The authors looked for two main effects in answering this question. The first, labeled subjective, involved the manner in which the "deviant" typified himself and others as a result of being officially labeled "undesirable." The second, labeled objective effects, involving the homosexual's behavior and the extent and nature of his social relationships subsequent to discharge. Contrary to expectations, they found no significant differences between the two groups other than employment discrimination, feelings of injustice and self-contempt, and fear that their deviance would be known by others due to the receipt of an undesirable discharge. Of course, these effects are normally felt by any individual who has received a discharge under less than honorable conditions. Even these disadvantages were not found to have existed for an extended period of time.

All in all, I found this book lacking in the degree of excellence and unbiased research normally found in the Kinsey studies. A typical example of the author's emotional approach to the problem may be found in the closing comment of their Epilogue: "The automatic use of less than honorable discharges in the military's disposition of homosexuals is in our eyes immoral"; this, despite their inability to find significant distinctions between the ultimate effect of less than honorable discharges and honorable dis-

charges on former service members. The scales remain, the questions go unanswered, and the prescriptions go unfilled.

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*Administrative Law Division, Office of The Judge Advocate General. The opinions expressed are those of the author and do not necessarily represent the views of any government agency.

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*Mention of a work in this section does not preclude later review in the *Military Law Review*.

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